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No. 63

IN THE

Supreme Court of the United States

October Term, 1937

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Appellants

v.

W. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD, Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUHERN DISTRICT OF GEORGIA

BRIEF ON BEHALF OF W. V. GRIFFIN AND H. W. PURVIS, RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

OPINIONS BELOW

There have been two opinions of the same specially constituted District Court, neither of which have been reported.

(1) The first opinion and decree filed January 23, 1935 (R. 29) held invalid the first order of the Inter-

state Commerce Commission of May 10, 1933, 192 I. C. C. 779 (R. 5), because the compensation fixed was not in compliance with the duty on the United States to pay "fair and reasonable compensation" and was not "just and equitable," and directed the Commission to take such further action as the law requires in view of the annulment and setting aside of the Commission's said order of May 10, 1933. That decree was not appealed.

(2) The second opinion filed February 23, 1937 (R. 55) held invalid the further order of the Commission of February 4, 1936, 214 I. C. C. 66 (R. 41) and again directed the Commission to take such action as the law requires. It is from that last decree that the present appeal has been taken.

JURISDICTION

The final decree of the District Court from which this appeal is taken was dated February 22, 1937 (R. 58). Petition for appeal was filed April 16, 1937 (R. 304) and allowed the same day (R. 307). The jurisdiction of this Court is founded upon the Urgent Deficiencies Act of October 22, 1913, chap. 32, 38 Stat. 203, 219, 220 (U. S. C., Title 28, Secs. 45 and 47a, Supp. III), and Section 283 of the Judicial Code, as amended by Act of February 13, 1925 (chap. 229, 43 Stat. 936, 938, U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted June 1, 1937.

The appellants now represent in their brief (page 17) that while the point was not urged in the court below because a decision on the merits was, and still is, preferred (*Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 487, 68. L. ed. 388), they regard it as their duty to call the court's attention to the question of whether a specially-constituted three-judge District Court properly has jurisdiction to review an order of the Interstate Commerce Commission fixing railway mail pay rates.

STATEMENT OF THE CASE

Description of the Carrier: The Georgia & Florida Railroad, which receivers are struggling to preserve, was described by the Commission in another proceeding on May 5, 1932 as follows:

> "The Georgia & Florida operates, as has been indicated, between a point in South Carolina and a point in Florida, traversing a large section of eastern Georgia. While it has always been a weak line, its abandonment would no doubt be a very serious matter for many shippers and communities that are dependent upon its service. The evidence before us, however, justifies doubt as to whether this road can survive, unless conditions speedily improve." *Georgia & Florida Railroad Receivers Reconstruction Loan,* 184 I. C. C. 332, 340. (Exhibit 766, R. 289).

Railway Mail Pay Legislation: The evolution of legislation on mail pay and its present status is best stated in the words of this Court in *United States* v. *New York Central Railroad Co.,* 279 U. S. 73, 79, 73 L. ed. 619, as follows:

> "The question is one of construction which requires consideration not of a few words only, but of the whole act of Congress concerned. This is the Act of July 28, 1916, chap. 261, sec. 5, 39 Stat. at L. 412, 425-431 (U. S. C. Title 39, chap. 15, where the long section 5 is broken up into smaller sections), which made a great change in the relations between the railroads and the government. Before that time the carriage of the mails by the railroads had been regarded as voluntary (*New York, N. H. & H. R. R. Co.* v. *United States,* 251

U. S. 123, 127, 64 L. ed. 182, 183, 40 Sup. Ct. Rep. 67); now the service is required (U. S. C. Title 39, sec. 541); refusal is punished by a fine of $1,000 a day (U. S. C. Title 39, sec. 563), and the nature of the services to be rendered is described by the statute in great detail. *Naturally, to save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive reasonable compensation.*" (Italics supplied.)

Description of Railway Mail Service: Railway mail service required by the Post Office Department is of two entirely distinct types but it is all measured and paid for upon a space basis. The two types are (a) railway post offices with clerks, and (b) storage and closed pouch without clerks:

(a) *Railway Postoffices:* This type of service consists of furnishing space on passenger trains for a travelling postoffice equipped with bins, boxes and racks for the receipt and delivery of mail and its assorting or distribution enroute by one or more mail clerks, and some mail storage space. The compensation includes the transportation of the clerk or clerks operating the travelling postoffice, and the transportation of the mail matter, and the furnishing of heat, light and janitor service.

Where the space requisitioned is less than that of a full sixty-foot car it is known as apartment car service and is furnished in combination cars, in the other end of which the railroad is free to handle baggage, express and passengers. For a 15-foot postoffice in a combination car the rate of pay prescribed for all railroads over

100 miles in length, *as a class,* is 14.5 cents per mile of transportation (R. 6). For railroads less than 100 miles but more than 50 miles in length, *as a class,* the rate prescribed is 27 cents per mile, and for railroads less than 50 miles in length, *as a class,* the rate prescribed is 34 cents per mile (144 I. C. C. 675, 718). There are some exceptions where the rates are higher for some railroads than for the others in the same class. (See table on page 93 and compare *Alabama, Tennessee & Northern Railroad Company,* 112 I. C. C. 151, and *Denver & Salt Lake Railway Company,* 151 I. C. C. 734.) (Appellants' brief, page 9.)

The railway post office type of service on the Georgia & Florida is in 15-foot units only and the rate prescribed is only 14.5 cents per mile, "based upon findings as to the average cost of transporting the mails on all railroads throughout the United States" over 100 miles in length. (Appellants' brief, page 8, 31.)

During a test period selected for cost determination 95 per cent of the railway mail service rendered by the Georgia & Florida was of this travelling postoffice type (R. 9, Appellants' brief, page 31).

(b) *Closed Pouch Service:* This type of service consists of the handling of locked sacks of mail and packages of parcel post, which are received and handled, that is, taken on board and put off, by railroad employees at the various stations through which trains with that type of service are operated. The very minimum amount of that type of service which the Post Office Department can requisition of a carrier as fixed by the Commission is the equivalent of the space of three

linear feet of car length to a height of six feet. The mail matter handled is not confined within three linear feet, but for convenience in practical handling it is usually spread out in station order over a much larger area of the car floor. The Commission has found by actual tests that an average of 56 sacks of mail can be stored in three linear feet of space, and so has said that the maximum authorization is 56 sacks or an equivalent in packages, but the actual volume may be anything less than that maximum. (Appellants' brief, page 41.) The rate prescribed for all lines more than 100 miles in length is only 4.5 cents per mile (R. 212). That is the rate ordered for this carrier.

Partly because of the difference between the space units requisitioned and the larger actual floor area occupied, it has always been agreed in every cost study between the Post Office Department and the carriers, with the Commission's approval, to take the amount of space authorized by the Department as being the equivalent of the linear feet of car space used, hence in a test period it is only necessary to actually measure the space occupied by the other classes of passenger service, viz., passengers, baggage, and express. (Appellants' brief, pages 32. 33.)

On the Georgia & Florida it is only the three-foot minimum units which are authorized, and during the representative test period this type of service constituted only 5 per cent of the total mail service rendered.

The Standard Method for Determining Mail Pay Rates: A cost study is the method followed and approved in all mail pay cases for the ascertainment of

the proportionate part of the expense of railway operation which is properly chargeable to the mail service, and also the proportionate part of railway property used for transportation of the mails. Its theory, in brief, is to first make a separation between freight and passenger services, and then a further separation of the different passenger services, so that regardless of whether other classes of service make or lose money on their operation, a separate determination can be made of the proper proportion of the operating expenses, and of the property used, which is chargeable to the mails. (Appellants' brief, page 31.) This makes it possible to arrive at a practical approximation of the rates of mail pay necessary to compensate the carrier for the cost of rendering the service and for the use of that part of the railway's property devoted to that service.

The Test Period: As a basis for the cost study, a test period of 28 days (1/13th of a year) is agreed upon by the Post Office Department and the carrier as being representative (R. 6, 96). Then each day in that test period, under the general supervision of a Post Office Department representative, measurements are made, based upon long established methods to determine just what part of the daily railway service is rendered in connection with transporting the mails. The space data thus obtained is then applied to operating expenses for the year to determine the cost of carrying the mail (R. 6).

The Rules for the Separation of Expenses: The rules prescribed by the Commission governing the separation of operating expenses between freight and passenger

services are followed (R. 6). These rules were issued on January 1, 1920, pursuant to authority of Section 20 of the Interstate Commerce Act, and the results of the apportionment reached under those rules must be shown in detail for the various primary operating expense accounts in the annual report of each carrier to the Interstate Commerce Commission (R. 258). Failure to carry out those rules would subject the carrier or individual responsible to fine provided in that section. Under those rules expenses of the passenger service are directly allocated as far as possible to passenger service proper (including baggage and miscellaneous), express and mail. The remaining expenses common to all three services, particularly in combination cars, are apportioned upon the space ratios. (Appellants' brief, page 31.)

Disposition of Unused Space: The unoccupied space in combination cars is distributed among the various kinds of passenger service in accordance with what is known as Plan 2 (R. 6, R. 292). This plan has been used and approved in all mail pay cases and, in short, provides that all cars "employed exclusively for one service are referred to as full cars, whether loaded or not, and the entire operation of each is allocated to the service to which it is assigned. The space in combination and mixed cars is allocated to each service according to the space used, except that space authorized for mail is regarded as space used. The unused space in such combination or mixed cars, and that unused space only, is apportioned in proportion to the space used. (R. 6, 7, Appellants' brief, page 32.)

The Rates Fixed under Present Law—First General Mail Pay Case: The present basis for space measure-

ment and allocation was first established by decision of the Interstate Commerce Commission in 1919 upon a nation-wide cost study made in 1916 in which the statistics for all lines reporting were combined, and a system of uniform rates based upon *averages* was established for all lines over 100 miles, and for separately operated lines less than 100 miles higher rates were established on an arbitrary percentage differential (56 I. C. C. 1).

Second General Mail Pay Case: In a second general case, in which the Georgia & Florida and a large number of short lines contended for separately established rates, (144 I. C. C. 675, 702) the Commission in 1928, after another nationwide cost study made in 1925, retained the system of average rates, and roads over 100 miles *as a class,* with an indicated average need for an increase of 26.61 per cent, were given an increase of 15 per cent, and roads under 100 miles *as a class,* with an indicated average need for an increase of 91 per cent, were given an increase of 80 per cent (see table with citations on page 93), (144 I. C. C. 675).

In that case the separate cost study for the Georgia & Florida which then showed an indicated need for an increase of 78 per cent was ignored and the weak Georgia & Florida was classified with all roads over 100 miles, including such great systems as the Pennsylvania Railroad and the Union Pacific.

This is frankly admitted by appellants at page 8 of their brief where they say:

> "These increased rates for carrying the mails, which are the present rates received by the Georgia

& Florida Railroad, were based upon *findings as to the average* cost of transporting the mails on all railroads throughout the United States, other than electric urban and interurban railroads." (Italics supplied.)

The Relief Prescribed by the Statute: The Railway Mail Act provides not alone for the fixing of mail pay rates by classes, but where such rates are non-compensatory, for separate ascertainments, the language being that—

> "Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein. (July 28, 1916, chap. 261, section 5, 39 Stat. 430.)"

The said "similar proceedings" include, of course, a hearing, and in *Baltimore & Ohio R. Co. v. United States*, 264 U. S. 258, 274, 68 L. ed. 675, this Court said:

> "The provision for a hearing implies both the privilege of introducing evidence and the *duty of deciding in accordance with it.* To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action." (Italics supplied.)

This Case: Continuing to be dissatisfied with the results of a classification whereby the Georgia & Florida Railroad with a gross railway operating rev-

enue of only $2,929.00 per mile was receiving only 4.5 cents per mile for 3-foot closed pouch authorizations and 14.5 cents per mile for 15-foot apartment authorizations (R. 212), which are exactly the same rates of mail pay as prescribed for a class of roads whose gross railway revenues averaged $21,788.00 per mile (Exhibit 748, R. 254), and in reliance upon the constitutional right to receive reasonable compensation, as indicated by this court in the *New York Central case, supra,* the Receivers began the present proceedings by a petition (R. 21) to the Commission on April 1, 1931 for an independent re-examination of its rates of pay.

The First Hearing: Substantially all of the evidence in the first hearing consisted of the introduction of and testimony with respect to a cost study made on the customary standard basis (R. 6), upon which, after consenting to certain adjustments claimed by the Post Office Department, the parties were agreed (R. 96) and which the Commission found showed an indicated need for an increase of 87.40 per cent in the rates of pay for this carrier (R. 8).

The Commission's First Decision: The Commission in its first report made no attempt to criticise the cost study but accepted it as at least "an approximation to be given such weight as seems proper in view of all the *circumstances.*" (R. 9.) (Italics supplied.)

The Final Factors in the Approximation: The final factors showed by the exhibits of the Post Office Department, concurred in by the carrier, and as reported by the Commission were as follows:

(1) *The Mail Revenue:* The mail revenue at the existing rates was only $35,728 per annum (R. 7).

(2) *The Proportion of Operating Expenses:* The proportion of the expenses of operation allocated and apportioned to the mail service was $40,673 per annum (R. 7). This proportion of the expense of operating the mail service was $4,945 per annum greater than the mail revenue per annum (R. 7).

(3) *The Proportion of Property Investment:* The proportion of the carrier's investment in road and equipment allocated and apportioned to mail was $457,082. A 5.75 per cent return on that sum was $26,282 per annum (R. 8).

(4) *The Result:* Adding together the deficit between the mail revenue per annum and the operating expense per annum for handling the mails of $4,945 to the 5.75 per cent return on $457,082 of property used in handling the mails, the additional amount needed to provide just compensation is $31,227, an increase of 87.40 per cent.

The "Circumstances" on which the Commission Relied for Disregarding the Cost Study: In its conclusions (R. 9) the Commission recited only the following "circumstances" on which it purported to rely when it gave no weight to the cost study: (a) that the mail with relation to other services in passenger train operations (all being conducted at a loss) bore a fair share of the expenses of operation and contributed *relatively* more than the other services for the space furnished; (b) that the carrier receives the same rates as are re-

ceived by other roads (of the *class* over 100 miles in length) for the same kind of service (c) that while many of the other roads are very much larger and have greater traffic and lower unit operating costs, nevertheless there are others in the same (unfortunate) situation as this carrier in respect of passenger train operations, and the data submitted failed to justify giving this carrier rates higher than those paid such other carriers for like service. Therefore on the recitation of those "circumstances" the Commission wholly rejected the proof of need for an increase of 87.40 per cent and concluded:

> "That the rates of pay now received by applicant for the transportation of mail, established in *Railway Mail Pay*, 144 I. C. C. 675, for railroads over 100 miles in length, are fair and reasonable." (R. 10.)

The First Bill of Complaint: The weight of the cost study being wholly unimpaired by any of these extraneous "circumstances" the appellees sought from the specially-constituted three-judge Court for the Southern District of Georgia, an injunction to set aside the Commission's order, on the ground that it was contrary to the evidence and was confiscatory (R. 1).

The Court's First Decision: After a hearing in which all the evidence which had been before the Commission was received, and after argument, the court held, among other things, that:

> (1) "No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is

annexed to petitioners' complaint, and it is therefore considered unnecessary and redundant to restate 'Findings of Fact' as provided by Equity Rule 70½. *The challenge is to the conclusion drawn from undisputed facts.*" (R. 29.) Italics supplied.)

(2) "The facts developed in the 'cost study' fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission." (R. 29.)

(3) "Such 'cost study' discloses among other facts that 'There was (1) a deficit in net railway operating income from mail of $4,945.00 based upon 1931 operations'." (R. 29.)

(4) "It further disclosed that as regards revenue: 'The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79' or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents." (R. 29.)

(5) "There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance." (R. 30.)

(6) "The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class I railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the trans-

portation of mail does not equal the cost of so doing." (R. 30.)

The court's conclusion on the undisputed facts was that:

> (7) "The bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C. A., Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. This compensation is not in compliance with the duty on the United States to pay 'fair and reasonable compensation' and is not 'just and equitable'." (R. 30.)

The court decreed that:

> (8) "Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933. Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what per cent of return on the investment, if any, would be required to make the compensation fair and reasonable." (R. 30.)

No Appeal: No appeal was taken from that decision of the lower court, and it stands unreversed (R. 55.)

The Commission's Second Decision: Instead of complying with the decree of the court to take such action as the law required to meet the duty on the United States to pay fair and reasonable compensation (R.

30) (i. e., to fix rates based on the undisputed evidence which would produce that result), the Commission re-opened the proceedings for another hearing at which the previous evidence stood uncontradicted, and in the absence of any substantial new evidence the Commission wrote another report "in the nature of a defensive thesis" explaining and in support of a reiteration of its first decision (R. 55).

The Court's Second Decision: The carrier then sought a second injunction and the lower court again enjoined the Commission (R. 55), and of the nature of the Commission's second decision it said (R. 58):

> "Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed 'to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively,' but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned 'in accordance with the formulas prescribed for Class I roads for the separation of expenses between freight and passenger service.'
>
> "The second report not only does not contradict this but reaffirms it in this language: 'The methods are the same as those prescribed in our rules governing separation of such expenses on large steam railroads'." (R. 58.)

The Court's View of the Merits: Among other things said by the court in its second decision were:

(1) "Neither applicant nor this Court entertains the view that the hypothetical cost is 'necessarily conclusive.' It is merely the fairest method that has been devised. If 'actual cost' as to each item be required applicants would be helpless and the Commission would be reduced to guessing. What elements may have been persuasive 'In other mail proceedings' are not necessarily to be considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element. Further, there is no testimony here as to 'unused space reported as operated.' There is included payment for unused space not operated, of which more later. There is nothing to justify disregard of the fact used in the first report that 'space authorized for mail is regarded as space used.' (R. 57.)

(2) *"The law as established in this case by the previous decision,* unreversed, makes inapplicable 'comparisons with compensation received from other services in passenger train cars;' 'comparisons with freight rates;' and 'comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole.' (R. 57.)

"There is no criticism of 'the character of the service performed in connection with transporting the mail.' (R. 57.)

(3) "Further argument of the Commission, as we understand it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the Post Office Department pays a part. We do not so understand the testimony. Our understanding is that

the unused space is the same wherever the partition be placed. "* * * an unnecessarily large car is used and this adds to the portion paid by the mail for unused space and that if 15 feet were eliminated from the car mail space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of $1,711. (R. 57, 58.)

* * * * *

(4) "We find nothing that warrants any change in our conclusions as to the legality of the order now before us from our previous conclusion as to the same rates except the fact, stated by implication, that the use of a mixed car shorter by 15 feet would result in a profit from mail revenue of $1,711 annually. The report discloses 'The total mail service investment thus derived was $457,-082.' This return is approximately .0037 per cent. This is not 'fair and reasonable'." (R. 58.)

The Court's Second Decree: The decree of the court in its second decision was that:

(1) "That said order of the Interstate Commerce Commission of February 4, 1936, is and has at all times been unlawful and that said order be set aside and annulled.

(2) "Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of February 4, 1936. This 22d day of February 1937." (R. 58.)

The appeal here is from that decision.

THE QUESTIONS PRESENTED

The appellants' assignments of alleged errors do not include all of the questions raised in their brief, and the appellees submit the following as a more logical arrangement of the questions which are presented in this case:

A. On the Jurisdiction of the Specially-Constituted Three-Judge Court:

This relates to an additional point first raised on page 17 of appellants' brief.

B. On the Extent of the Jurisdiction of the Court on the Question of Just Compensation:

This relates to appelants' assignment of error 3 (page 17).

C. On the Proposition that the Order of the Commission was Unlawful and Contrary to the Evidence:

This relates to appellants' assignment of errors 1, 2 and 4 (page 17).

D. On the Alleged Insufficiency of the Bill of Complaint:

This relates to an additional point first raised on page 58 of appellants' brief.

E. On the Law of the Case as Established by the Lower Court's First Decision:

This relates to appellants' assignment of error 5 (page 17).

SUMMARY OF ARGUMENT

The argument herein will follow the same order outlined under "The Questions Presented," and will support the following propositions:

(A). That the order of the Interstate Commerce Commission fixing rates for carrying the mails *by railway common carriers engaged in interstate commerce* is reviewable by the specially constituted three-judge District Court under the Urgent Deficiencies Act (38 Stat. 219: U.S.C. Title 28, Sections 41, 43, 44) and that the parties are apparently agreed in their desire for a decision on the merits, as in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456. (See footnote on page 17 of appellants' brief.)

(B). That the matter of rates of railway mail pay fixing compensation for carrying the mails is a judicial question reviewable by the Courts. (*Baltimore & Ohio Railroad Co.* v. *United States,* 298 U. S. 349, 80 L. ed. 1209.)

(C). That the decision of the Commission was arbitrary and contrary to the evidence and in violation of the due process clause of the Federal Constitution; that the rates prescribed for the Georgia & Florida are confiscatory, that an increase of 87.40 per cent is necessary in order to comply with the duty of the United States to pay just compensation; and that the fact that rates of mail pay have heretofore been fixed for a large group of carriers as a class based on average costs of all lines over 100 miles in length does not deprive the Georgia & Florida of its statutory

and constitutional rights to have rates determined upon its own facts.

(D). That no question was raised in the lower court upon any alleged insufficiency in the bill of complaint; and that on the face of the bill of complaint itself, and also by copies of the Commission's reports and findings of facts which were attached thereto, are sufficiently shown all the facts which needed to be pleaded.

(E). That the law as established in this case by the previous decision, unreversed, makes inapplicable "comparisons with compensation received from other services in passenger train cars;" "comparisons with freight rates;" and "comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole." (R. 57.)

(F). That the suggestions (a) that if the rates are increased the Post Office Department might not use the service is refuted by the record and does not take from the weight of the cost study; and (b) that the "Commission's apprehension that its real authority" might be affected is unwarranted and is no sound reason for disregarding the evidence.

ARGUMENT

A. On the Jurisdiction of the Specially-Constituted Three-Judge District Court.

It is a fundamental rule that the government may not be sued without its consent, but it has consented to be sued in the Federal District Courts "to enjoin, set aside, annul or suspend in whole or in part *any* order of the Interstate Commerce Commission." (Urgent Deficiencies Act, 38 Stat. 219; U. S. C., Title 28, Sections 41, 43 and 44.) The consent is not limited to orders of the Commission entered in the performance of its duties under the Interstate Commerce Act. (41 Stat. 499, U. S. C., Title 49, Section 27.)

This Court in *United States* v. *New York Central Railroad Company*, 279 U. S. 73, 79, 73 L. ed. 619, had under consideration an order of the Interstate Commerce Commission fixing rates of mail pay for the future and retroactive to the date of filing of the application with the Interstate Commerce Commission. This Court, after referring to the requirement of the Railway Mail Act (U. S. C. Title 39, Chapter 15), which required that common carriers by railroad carry the mails when requested to do so by the Postmaster General, under penalty of a fine of $1,000 a day upon refusal, said:

> "Naturally, to save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive reasonable compensation. * * * The government admits, as it must, that reasonable compensation for such required services is a constitutional right. So far

as the government has waived its immunity from suit, this right may be enforced, in the absence of other remedies, *not only by injunction against further interference with it,* but by an action to recover compensation already due. Accordingly the statute provides for application from time to time to the Interstate Commerce Commission to establish by order a fair, reasonable rate or compensation to be paid at stated times. U. S. C. Title 39, Sections 542, 551, 554." (Italics supplied.)

In that case this Court upheld the right of the railroads to collect by suit in the Court of Claims the retroactive mail pay at the rates established in the Commission's order. It is to be noted that the language of this Court is to the effect that the right to fair compensation may be enforced, first, by injunction or, second, by an action to recover compensation already due.

Congress in enacting the Railway Mail Act placed the jurisdiction for first determining a fair, reasonable rate of compensation to be paid for the carrying of the mail in the Interstate Commerce Commission, and the Court of Claims, in a suit brought by a railroad to collect compensation for carrying the mail without having previously obtained an order from the Interstate Commerce Commission, has said that in the absence of such order it has no jurisdiction to entertain a suit to collect pay for carrying the mail.

In the case of *Pere Marquette Ry. Co.* v. *United States,* 59 Ct. Cl. 538, the Court of Claims refused to take jurisdiction of such a suit, and in refusing said:

"The Act of July 28, 1916, clearly intended that all questions of the compensation to be paid railroad companies for carrying the mails should be determined by the Interstate Commerce Commission. The Commission having acted within the scope of its authority, having fixed the reasonable compensation to which the plaintiff is entitled, this court cannot review the action of the Commission and undertake to fix a different compensation from that arrived at by the Commission."

Compare *Denver & Rio Grande R. R. Co.* v. *United States*, 50 Ct. Cl. 382.

The refusal of the Court of Claims to entertain suits for additional mail pay in cases where the Interstate Commerce Commission has failed or refused to grant increases, leaves to the carrier, which believes that an order of the Commission is invalid for failure to allow a non-confiscatory rate, only the remedy of injunction.

The right of injunction must lie, if anywhere, in the District Courts of the United States, and as stated in appellants' brief the history of the District Court's jurisdiction in enjoining and setting aside orders of the Interstate Commerce Commission is outlined in *Procter & Gamble Company* v. *United States*, 225 U. S. 282, 302, 56 L. ed. 1091. It is apparent from that decision that all of the jurisdiction then existing in the Circuit Courts of the United States to enforce or enjoin any order of the Interstate Commerce Commission was transferred to the Commerce Court upon its creation by the Act of June 18, 1910 (36 Stat. at L. 539, Chapter 309). The language of that Act is:

"Sec. 207. The commerce court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty, or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part any order of the Interstate Commerce Commission. * * * *"

This Court had before it for review in that case a proceeding arising under the provisions of the Interstate Commerce Act, and consequently spoke of orders of the Interstate Commerce Commission rendered in connection with the Interstate Commerce Act, but not in a way to limit the jurisdiction to orders in cases arising only under that Act. Neither does the language of this Court in *United States* v. *Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299, 71 L. ed. 655, so limit the jurisdiction. In the *Los Angeles & Salt Lake Railroad Company case* this Court said that an order of the Interstate Commerce Commission purporting to determine the final value of a railroad company's property was not such an order as could be the subject of judicial review in the manner set out in the Urgent Deficiencies Act. The Court said:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license;

which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commisison, through its employees. It is the exercise solely of the function of investigation. Compare *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, 62 L. ed. 135, 38 Sup. Ct. Rep. 30. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a state. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof."

The statement should also be noted in the *Los Angeles & Salt Lake case* that during the first nineteen years of the Interstate Commerce Commission's existence no order was reviewable by the courts. The Court points out that "the statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience

of its orders was first made punishable." (Hepburn Act, June 29, 1906, chap. 3391, sections 2-7, 34 Stat. at L. 584, 586-595; U. S. Code Title 49, chap. 2.)

The decision of this Court in *Great Northern Railway* v. *United States,* 277 U. S. 172, 183, 72 L. ed. 838, is not conclusive in this case because the Court specifically found that *a certificate* issued by the Commission under the so-called guaranty provisions of the Transportation Act of 1920, Sections 209 and 212, was not an order of the Commission, but was only a recital of a finding of fact addressed only to the Secretary of the Treasury. Since that case, however, this Court has had occasion to review the decision of a specially-constituted three-judge District Court involving an order of the Commission which had no connection with the Interstate Commerce Act, namely, the case of *United States* v. *Baltimore & Ohio Railroad Company et al.,* 293 U. S. 454, 465, 79 L. ed. 587. That case involved an order of the Interstate Commerce Commission under the so-called Boiler Inspection Act, entered on January 5, 1933, requiring the railroads to equip "with a suitable type of power reverse gear" all steam locomotives built on or after April 1, 1933, and to similarly equip existing locomotives when they first received major repairs. The Boiler Inspection Act which was involved in that case (43 Stat. 659, U. S. Code Title 45, chap. 1, sections 22 to 34), was not an amendment to the Interstate Commerce Act, but was entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." Nor was there any reference

in the Act as originally enacted in 1911, or in the amendment of June 7, 1924, to any provision whatever for court review of the Commission's action thereunder. In fact, the Commission's jurisdiction to make any order compelling the installation of specific equipment upon locomotives was even questioned by the carriers in the lower court (*Baltimore & Ohio Railroad Company et al.* v. *United States,* 5 Fed. Sup. 929). However, the authority of the Interstate Commerce Commission to make the order there under review was held by this Court, in the absence of specific authority in the Act, to be necessarily implied from the various provisions of the Act. The specially-constituted statutory three-judge District Court convened in accordance with the terms of the Urgent Deficiencies Act, refused the injunction prayed for, and this Court affirmed the action of that Court on the merits, without any hint or suggestion that although the Boiler Inspection Act was no part of the Interstate Commerce Act, the special statutory method provided for review of "any order of the Interstate Commerce Commission" was not available in that case.

The contention of the appellants that railroads are not now acting as common carriers in the transportation of the mails does not appear to be sustained by the decisions cited. The leading case cited is that of *Atchison, Topeka & Santa Fe Railway Company* v. *United States,* 225 U. S. 640, 650, 56 L. ed. 1236. That case was decided, however, in the October Term of 1911, at a time when the relation between the Post Office Department and the railroads was entirely different than as it existed after the enactment of the Railway Mail Act in 1916, for the railroads were then carrying

the mail as contract carriers under voluntary contracts separately entered into.

The reverse would seem to be true today. The railroads in transporting mail are required to do so because they are common carriers, and the regulation of the rates of common carriers for transporting the mails is a regulation of interstate commerce. The Railway Mail Act is fully of phraseology that "all common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States," "the Commission shall proceed with the hearings as provided by law for *other hearings between carriers and shippers* or associations," "the Commission is authorized to make such classification of carriers," "for the purpose of Sections 524 to 586 of this title the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger and express rates to be paid by private shippers."

It should be noted that in Section 547 the law uses the phrase "the Commission shall proceed with the hearing as provided by law for other hearings between carriers and shippers or associations." The language quoted would indicate that Congress considered the Post Office Department in offering mail for transportation in interstate commerce as a public shipper over a common carrier railroad as distinguished from private shippers.

Attention is also called to Sections 557 and 558 of the Railway Mail Act providing that mail matter other

than first-class may be transported at not more than the charges for express matter, and that the transportation of mail matter of the fourth-class and periodicals may be authorized at the postal carload or less-than-carload rate, apparently at rates similar to carload and less-than-carload freight rates.

Consideration of the history of the Postal Service of this country would also lead to the conclusion that today a railroad in transporting mail matter, especially those classes of mail matter other than first-class, is doing so as a common carrier in interstate commerce. This Court, in the case of *In the Matter of A. Orlando Jackson,* 96 U. S. 727, went into the history of the powers of Congress under the authority of the Constitution "to establish post offices and post roads." It spoke of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted—consisting of letters, of newspapers and pamphlets. Since the time when the Constitution was written, the postal service has been greatly expanded until today it includes merchandise (including farm and factory products), and all other mailable matter not included in the first, second, or third classes, and under postoffice regulations in some instances weighing as much as 200 pounds. There appears to be no fixed limit beyond which the Federal Government cannot go in including products of the farm or factory in the mails. If Congress sought to do so, they could probably include articles as large as automobiles in carload lots, or almost any other manufactured product. One could hardly say, when the Post Office Department will handle articles like typewriters, crates of eggs, and almost every other article imaginable, except

such as are quickly perishable or inherently dangerous, that it is not in the express business in competition with the carrying of express by the railroad companies, and that such competitive handling of parcel post when transported by the railroads under compulsion, rather than by voluntary contract, at rates determined to be reasonable by the Interstate Commerce Commission, is not transportation by the railroads in their common carrier capacity.

Thus from a sudy of the decisions it is evident that the lower court as constituted in this case had full jurisdiction to enjoin the carrying out of the Commission's orders under the provisions of the Urgent Deficiencies Act. In fact, it would not appear that the question is regarded very seriously by appellants, for at page 17 they explain their position thus:

> "This point was not urged in the court below because the suit brought by the Georgia & Florida was the first under the Urgent Deficiencies Act to review a railway mail pay order of the Commission. There are many other carriers similarly situated to the Georgia & Florida and additional suits will be brought if this litigation warrants. For that reason the Commission desired a decision on the merits as a guide. Compare *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 475, 68 L. ed. 397. *While the Commission would still prefer a decision on the merits*, we regard it as our duty to call the Court's attention to the jurisdictional question."

In the *Dayton-Goose Creek case* to which appellants refer, this Court said:

"The question of equity jurisdiction, raised below, has not been discussed here by counsel for the appellees, either upon their briefs or in oral argument. They do not rely on it, but seek without delay a decision on the merits."

Appellees of course also want a decision on the merits and respectfully urge that full jurisdiction to decide the case on the merits was in the specially-constituted three-judge District Court.

B. On the Extent of the Jurisdiction of the Court on the Question of Just Compensation

(Assignment of Alleged Error 3)

Upon assignment of error 3, appellants make but slight argument to support their position and content themselves with mere statements that:

> "The weight to be accorded by the Commission to the cost study, like the question of the weight to be accorded any other item of evidence, is peculiarly for the Commission. *Illinois Commerce Commission v. United States*, 292 U. S. 474, 480-481. Cf. *Baltimore & Ohio R. R. Co. v. United States*, 298 U. S. 349." (Appellants' brief, page 39.)

Appellees respectfully urge that the decisions of this Court do not hold that the question of weight to be accorded any item of evidence is peculiarly for the Commission and not for the Court, where there is a taking of property and the question of just compensation required by the Constitution is involved. That this question is involved in every case in which the Commission is called upon to determine the rates of mail pay was pointed out by this Court in *United States v. New York Central Railroad Company*, 279 U. S. 73, where it said:

> "The question is one of construction which requires consideration not of a few words only, but of the whole act of Congress concerned. This is the Act of July 28, 1916, chap. 261, sec. 5, 39 Stat. at L. 412, 425-431, (U. S. C. title 39, chap. 15, where the long sec. 5 is broken up into smaller sections), which made a great change in the relations between the railroads and the government. Before that

time the carriage of the mails by the railroads had been regarded as voluntary (*New York, N. H. & H. R. Co. v. United States*, 251 U. S. 123, 127, 64 L. ed. 182, 183, 40 Sup. Ct. Rep. 67); now the service is required (U. S. C. title 39, sec. 541); refusal is punished by a fine of $1,000 a day (U. S. C. title 39, sec. 563), and the nature of the services to be rendered is described by the statute in great detail. Naturally, *to save its constitutionality* there is coupled with the requirement to transport a provision that the railroads shall receive reasonable compensation."

* * * * * *

"The government admits, as it must, that reasonable compensation for such required services is a constitutional right." (Italics supplied.)

It would seem that this Court had fully disposed of the question of the duty of the Court in reviewing the action of the Interstate Commerce Commission where a question of confiscation is involved in its decision in the case of *Baltimore & Ohio Railroad Company v. United States*, 298 U. S. 349, 80 L. ed. 1221, cited by appellants at page 39 of their brief. This Court in its opinion in that case said:

"There is a wide and fundamental difference between the question whether the commission, in prescribing divisions found by it to be just, reasonable and equitable, complied with the procedural requirements of the Act, and whether, if enforced against objecting carriers, the order will confiscate their property. The commission's findings of fact in the field first mentioned, if based on evidence, are conclusive. But, upon the question whether prescribed divisions constitute just compensation within the meaning of the Fifth Amend-

ment, Congress is without power conclusively to bind the carriers. As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment."

Then the opinion went on to review and quote liberally from a number of prior decisions of this Court in which the rule of law has been definitely laid down that the ascertainment of what is just compensation is a judicial question and not a legislative one. The cases quoted from were *Chicago, Milwaukee & St. Paul R. Co. v. Minnesota,* 134 U. S. 418, 33 L. ed. 970; *Monongahela Navigation Company v. United States,* 148 U. S. 312, 37 L. ed. 463; *Reagan v. Farmers Loan & Trust Company,* 154 U. S. 362, 38 L. ed. 1014; *Seaboard Air Line Railway Company v. United States,* 261 U. S. 299, 67 L. ed. 664; *United States v. New River Collieries,* 262 U. S. 341, 67 L. ed. 1014; *West v. Chesapeake & Potomac Telephone Company,* 295 U. S. 662, 79 L. ed. 1640; and *St. Joseph Stock Yards Company v. United States,* 298 U. S. 38, 80 L. ed. 1033. The comment upon and quotation from one of these cases is so pertinent that it is quoted as follows:

"In Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 S. Ct. 622, this court held repugnant to the Fifth Amendment an Act of Congress purporting to exclude an element of value. It said (p. 327): 'By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what pri-

vate property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry'."

After discussing each one of those cases and pointing out the universal rule of law laid down in them, this Court said:

"The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

The case of *Illinois Commerce Commission v. United States*, 292 U. S. 474, 78 L. ed. 1371, cited by appellants,

does not in any way raise the question of just compensation as guaranteed by the Constitution, and what the Court said there about the reasonableness of the weight given the evidence before the Commission does not apply here. In that case a cost study had been made and a considerable time had elapsed since the making of that study. One of the parties to the proceeding raised the question before the Interstate Commerce Commission that conditions had so changed as to make the cost study no longer of value, and requested that a new cost study, based on conditions five years later, be made. The Commission held that conditions had not changed sufficiently to make the results of the cost study nonrepresentative of later conditions. The Court held, there being no question of confiscation involved, that where a purely legislative question was involved, the Court could not review the question of weight given various factors by the Commission. The situation is entirely different from the present one, as was so well pointed out in the comment and quotation from *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, 38 L. ed. 1014, appearing in this Court's decision in *Baltimore & Ohio Railroad Company v. United States, supra*, reading as follows:

> "In Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 38 L. ed. 1014, 14 S. Ct. 1047, 4 Inters. Com. Rep. 560, a fully considered case presenting the question whether a circuit court of the United States had power to enjoin enforcement of confiscatory state-made railroad rates, this court, upon an abundance of authority found in the earlier decisions, held that it had. The opinion declares (p. 399): 'These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of fram-

ing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held'."

On page 7 of appellants' brief the thought is thrown out that the Railway Mail Act "contains no prevision for judicial review of Commission orders fixing compensation," but that "what it does provide, if a carrier is dissatisfied with its rates of pay, is a re-examina-

tion into the question by the Interstate Commerce Commission, after the lapse of six months."

Of course if appellants seriously rely on this as an argument to support their assignment of error No. 3, that the court has no jurisdiction to review the evidence and form an independent judgment upon that evidence, the obvious answer is that if such an argument is sound the Act would be unconstitutional. That is obvious from the decisions cited and commented upon in *Baltimore & Ohio Railroad Company v. United States, supra.* See also *Ohio Valley Water Company v. Ben Avon Borough,* 253 U. S. 287, 64 L. ed. 908.

C. On the Proposition that the Order of the Commission was Unlawful and Contrary to the Evidence

(Assignment of Alleged Errors 1, 2 and 4)

Under the title "II. *The action of the Commission in declining to order an increase in the rates of railway mail pay for the Georgia & Florida is supported by substantial evidence and was not arbitrary in any respect,*" the appellants argue at page 37 of their brief to the effect that on appellees' theory the Commission would be nothing more than a checker or annotator of statistics submitted to it and that the District Court also appears to entertain the same view.

The appellees deny the correctness of that representation but do maintain that the refusal of the Commission to order an increase in the rates of railway mail pay for the Georgia & Florida is contrary to the evidence and the Commission's findings based upon such evidence and was arbitrary. (*Chicago Junction Railways case*, 264 U. S. 258, 68 L. ed. 675.)

It is, of course, the duty of the Commission to weigh the evidence in the first instance but in the words of this Court in *Baltimore & Ohio Railroad v. United States*, 298 U. S. 349, *supra*,

> "• • the due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence *and have judicial findings based upon it.*" (Italics supplied.)

The Real Question: On the merits the matter really resolves itself into the question of whether the Commis-

sion's order was arbitrary and contrary to the evidence. That is an issue which calls for consideration of the evidence which was before the Commission and of every reason given by the Commission in either its first or second decision for completely disregarding the cost study:

FIRST—As to the Evidence

The Cost Study: A test period was agreed upon with the Post Office Department as being representative, and a space test was conducted *on the Georgia & Florida only* for a period of 28 days extending from September 28 to October 25, 1931, inclusive, under the supervision and direction of a representative of the Post Office Department (R. 94).

The Adjustment Required: There were no controversies or disputes between the Post Office Department and the carrier upon any of the figures of the test period. However, the Department made a calculation to check the number of car-miles in the test period against the carrier's total car-miles for the entire year, and discovered that the number of car-miles for the test period did not represent 28/365ths of the total number of car-miles actually operated during the year, because the carrier ceased operating certain of its trains in the early part of 1931, and the mail service formerly carried on those trains had, of course, been discontinued. Consequently, when the Post Office Department and the carrier came to apply the results of the test period to the full year it was agreed between the parties before the Commission that adjustments be made because of the change in the train service and the

elimination of some of the authorized mail routes (R. 122, 123).

During the test period 15.03 per cent of the total space available in passenger service was allocated as chargeable to the mail, but by this agreement this ratio was reduced to 12.96 per cent. The railroad criticized the adjustment as going too far in the other direction, because it gave full effect to the results of train operations permanently discontinued prior to the test period, so that the allocation of 15.03 per cent of the total space in passenger service was really more representative of conditions following such discontinuance of service than an adjustment to the average of the entire year; but as the carrier wanted to be sure that there could be no question of the accuracy of the result it accepted the adjustment as so made. Indeed in every instance of doubt the railroad agreed to every possible adjustment suggested by the Post Office Department in the hope that it could not even be argued that the result would err in favor of the railroad, and so that the need demonstrated by the result of the cost study would be accepted as conservatively indicating the minimum need. In fact, not only were the space tabulations agreed upon, but all of the operating and financial statistics were checked by the Post Office and the carrier and agreed upon (R. 96).

The Post Office Department's Agreement on the Cost Study: The Post Office Department, as stated, took no exception to any of the basic facts of the cost study, and indeed the chief witness for the department testified that:

> "In this case the test period was selected, as well as could be determined by both parties, as being

representative, and after that test period was ran, the Postoffice Department made its calculations and compared same with the year's figures, which indicated to the mind of the Postoffice Department that *in order to make it absolutely fair* that some adjustments should be made in favor of the department. All of those adjustments were granted by the Georgia & Florida. There were no differences left in dispute between the railroad as to the correctness of the figures as shown by the test period. I am speaking of the space figures, the test figures. We did question the application of Plan No. 2. That is where we differed with each other.

* * * * * *

"'A. It was the most equitable basis that I could devise, and because it was, I think that the representatives of the railroad company accepted that basis'." (Italics supplied.) (R. 96.)

The Apportionment of Unoccupied Space in Combination Cars: The standard "Plan 2" referred to was the one prescribed by the Commission, and, pursuant to its usual custom in all other mail pay cases the Department again questioned that rule for distributing the waste space. However that question is not here in issue, as the Commission in both of its decisions approved that method of apportioning waste space, and the appellants are here arguing for the correctness of the Commission's second decision, and appellees agree that "Plan 2" is the correct method for the apportionment of unoccupied space.

The Increase Needed as Shown by the Undisputed Cost Study: Based upon the cost study figures *before any adjustment* the increase in rates necessary to meet

the duty of the United States to pay just compensation was 118 per cent (R. 7), but *after adjustments* suggested by the Department, all of which were accepted by the carrier, the Department's own exhibits and testimony on the cost study showed (1) that the mail revenue was at the rate of only $35,728 per annum (R. 7); (2) that the expenses of operation chargeable to the mail service were $40,673 per annum; (3) that the deficit in net railway operating income from mail was $4,945 (R. 7); and (4) that in addition to that deficit $26,282 per annum would be necessary to pay a return of only 5.75 per cent upon the value of the property devoted to the mail service (R. 8); so that to pay the expenses and a 5.75 per cent return a total additional amount per annum of $31,227, or expressed percentage-wise an increase of 87.40 per cent would be required (R. 8).

The Post Office Department's Reliance on Classification: It was not upon any issue of fact, or upon any question of inaccuracy in the cost study, or unfairness in the compensation indicated by the cost study to be needed that the Department took a stand. They relied mainly upon the argument that it would be disadvantageous to make a departure from the group *classification* in which the Georgia & Florida was included (R. 80). The chief counsel for the Department expressed this attitude in the hearing, in briefs, and in oral argument. In the hearing he said:

> " 'Mr. Wise. In other words, Mr. Examiner and counsel for the carrier, the Department is not opposing any railroad or anything that is reasonable in the way of a rate at all, but our position is that

we cannot look at a railroad *individually,* because when a railroad perhaps comes to us we have to look at the whole proposition collectively. And this is an indication of our *collective problem'.*" (R. 7, 80.) (Italics supplied.)*

The Commission's Findings: The results obtained from the one and only cost study in the record are best described in the Commission's first report and even though it is somewhat of a repetition, were as follows:

"For the year ended December 31, 1931, the total operating expenses, railway tax accruals, net equipment, and joint-facility rents were $1,449,801. Of this amount 21.74 per cent, or $315,273, was apportioned to passenger train service in accordance with the formulas prescribed for Class I roads for the separation of expenses between freight and passenger services. Certain expenses were directly allocated to passenger traffic. The remainder was apportioned upon the space ratios as adjusted by the department. The total apportioned to mail was $40,673. The computed deficit in net railway operating income from mail was $4,945.

"The total investment in road, excluding unrelated items, was $15,864,462. Of this, 21.44 per cent, or $3,401,578, was apportioned by the De-

*(From the Post Office Department's Reply to Exceptions dated December 14, 1935.)

"Applicant has repeatedly urged upon the Commission its claims that it should not be treated as a Class I railroad, and the Commission has given consideration to these claims and disposed of them in previous decisions fixing rates for railway mail pay. In *Railway Mail Pay,* 144 I. C. C. 675, 676, the Commission disposed of this matter, at which time applicant endeavored, by becoming a member of the Short Line Association, to receive special consideration as a short line road, but the Commission expressly stated that it is a Class I road and fixed its rates accordingly. The Commission reaffirmed this decision in 192 I. C. C. 779."

partment to passenger-train service. The part of the latter amount apportioned to mail upon the adjusted space ratio was $438,803. The total investment in equipment, less depreciation, allocated to the passenger-train service was $135,257, approximately 10 per cent of the total. Of this amount $18,279 was allocated and apportioned to the mail service. The total investment in road and equipment allocated and apportioned to mail was $457,082. A return upon this computed at 5.75 per cent is $26,282 which, added to the indicated deficiency in net railway operating income from mail of $4,945, brings the total claim of the carrier for increased compensation to $31,227. *To meet it upon the basis of 1931 operations would require an increase in compensation of 87.40 per cent.*" (Italics supplied.) (R. 7.)

The appellees believe that the foregoing statements were formal findings of the Commission, for if they are not such findings there are no findings in the report except the very final conclusion. Appellees submit that the Commission did not state the figures in its report merely to show what the carrier claimed, but that the statements were in fact findings on the evidence of the cost, all of which was undisputed.

However, wholly disregarding those findings which showed that an increase of 87.40 per cent was necessary, the Commission, in its first order fixed the rates of mail pay no higher than they had been in the past.

The First Decision of the Court: It was of that situation with respect to the evidence and upon the Commission's own findings as to what was the evidence,

and after bill and answer and a full hearing and argument, that the lower court said:

> "No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is annexed to petitioners' complaint, • • •. The challenge is to the conclusion drawn from undisputed facts" (R. 29).

The court also pointed out that there was no attack upon the efficiency of the operation of the railroad and no charge of extravagance. (R. 30).

It is highly significant that that decision was not appealed.

The Record in the Second Hearing: Although there was already in the record an undisputed cost study, made pursuant to the methods approved in all other mail pay cases, agreed upon between the two parties, and with the same supporting evidence found sufficient by the Commission in all other cases, upon which the Commission should have ordered an increase of 87.40 per cent, the Commission reopened the proceedings for further hearing.

Upon the rehearing before the Interstate Commerce Commission, little, if any, new factual evidence was presented by either party. Certain operating data was brought down to date in exhibits filed by the Post Office Department, and at the time of its presentation the witness for the Department stated that it showed

mainly that the Georgia & Florida Railroad performed practically the same mail service and received practically the same compensation as received during the year 1931 (R. 85). It was not considered necessary by either party to the proceeding for a new cost study to be made, and no new cost data was introduced at the rehearing on June 24, 1935 (R. 85, 86).

There was only one new fact adduced at the rehearing: J. L. Fulghum, a witness for the Post Office Department, testified that as Chief Clerk, Railway Mail Service, District No. 2, 4th Division, which includes the Georgia & Florida Railroad, he had made a complete inspection of the service on that railroad on March 14, 1935. He said that "on the date of the inspection we were operating a 30-foot apartment car." He made only the one trip (R. 97, 99) and gave no testimony that the use of a 30-foot apartment for mail instead of a 15-foot apartment space would in any way increase the amount of waste space in the car, and so affect the accuracy of the cost study. The other testimony at the hearing was devoted in large measure to a reading from the Commission's uniform classification of accounts its own rules for the separation of expenses as between freight and passenger services, the methods which carriers, including the Georgia & Florida, are compelled to follow under severe penalties for failure to do so. There was nothing new in this however, for the Commission, having promulgated those rules by formal order and having made them applicable to the Georgia & Florida Railroad, certainly knew the provisions of its own rules when it made its first decision (R. 258).

In fact, the Commission in *Excess Income of Richmond, Fredericksburg & Potomac Railroad Company,* 170 I. C. C. 451, 519, said that the use of their classication of accounts was so general and the knowledge of them was such that Congress must be presumed to have legislated in accordance with such knowledge, saying so in the following language:

> "Congress based recapture expressly upon 'net railway operating income', defined as 'railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.' Each of the terms used in definition has a precise meaning in our classification of accounts, and each was understood at the time the law was enacted according to those meanings, because *the classification was uniformly followed in railroad accounting and there were no accounting data in existence to which they might have been applied in any other sense.* Congress must, therefore, be understood as having used them with the same meaning and to have intended accordingly that, wherever it could be done without confiscation resulting, operating expenses were to be computed in accordance with our classification of accounts and not on the basis for which the respondent contends." (Italics supplied.)

Reliability of the Space Studies: Not only were the space studies made according to the Commisison's own rules and regulations, which have been invariably approved by the Commission, but there was no substantial evidence indicating any inaccuracies in the result, especially after adjustments agreed upon between the parties had been made to meet every possible suggestion of error. Yet appellants are here

questioning the result of the cost study, raising strained contentions as to the extent of use of the three-foot closed pouch units and the effect of the position of a partition in the midst of unused space as justifying the entire disregard of the cost study. This Court has said, however, that it is approximate correctness that is required and not mathematical exactitude. (See *Baltimore & Ohio Railroad Company v. U. S.*, 298 U. S. 349, 378, 80 L. ed. 1209.) This same rule was applied by the lower Court when it said:

> "Neither applicant nor this court entertains the view that the hypothetical cost is 'necessarily conclusive'. It is merely the fairest method that has been devised. If 'actual cost' as to each item be required applicants would be helpless and the Commission would be reduced to guessing. What elements may have been persuasive 'in other mail proceedings' are not necessarily to be considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element. Further, there is no testimony here as to 'unused space reported as operated'. There is included payment for unused space not operated, of which more later. There is nothing to justify disregard of the fact used in the first report that 'space authorized for mail is regarded as space used.'" (R. 57.)

SECOND—As to the Reasons Given by the Commission for Disregarding the Evidence

To facilitate the consideration of the Commission's reasons all of them as given in both of its decisions are summarized, and numbered below:

The Reasons Given in the Commission's First Decision: After first finding that the cost study by the Post Office Department, made in accordance with approved methods, and (after adjustments claimed by the Department and conceded by the Carrier), showed that an increase of 87.40 per cent was required to meet the indicated need for just compensation, the Commission summed up the case in the following words:

> "Applicant bases its claim for higher rates upon the space data of the test period and their application in a cost study; and also upon the fact that, because of its low traffic density and low earnings per mile of road, it is not comparable with many class I roads which receive the same rates of pay" (R. 9).

It then declared that while a cost study was an approximation of the actual cost of service, it was only to be given such weight as seems proper in view of all the *circumstances.* The following were the Commission's exact words:

> "The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See Railway Mail Pay, supra" (R. 9).

Then the Commission specified all of the *circumstances* on which it then apparently relied for giving no weight to the approximation of the actual cost of the service:

(1) That "the comparison of mail revenue with other revenue received for services in passenger-train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished" (R. 9).

(2) That "applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand, many are in much the same situation as the applicant in respect of passenger-train operations. The data submitted fail to justfy giving the applicant rates higher than those now paid other railway common carriers for like service" (R. 9, 10).

The Reasons Given in the Commission's Second Decision: In its second decision on the same cost study, after stating that no additional tests were made, the Commission advanced the following additional reasons:

(3). That the cost study (which it had previously termed an approximation of the actual costs) was a hypothetical cost not necessarily conclusive (R. 44).

(4) That the space data in the cost study could not be accepted as an accurate guide beause there an alleged "extra 15 feet of space was added to unoccupied space in the combination car * * *", which "increases the amount of space and the expense apportioned to mail" (R. 45).

(5) That an element of doubt as to the reliability of the space study arises from treating 3-foot units of authorized mail space as the full space used by mail, regardless of the loads carried (R. 47).

(6) That a change in the use of space by any of the different services might change the apportionment to either service due solely to change in the other (R. 48).

(7) That if all the entire space on passenger trains paid as much per foot as the rates prescribed per foot for the amount of space authorized for the mail, the revenue per car-foot mile would approach quite closely the fully hypothetical cost per car-foot mile plus a 5.75 per cent return both for mail service and for passenger train service as a whole (R. 49).

An examination of each of all the seven reasons given by the Commission in its two reports now follows:

(1) *Comparisons with Other Classes of Service:* On page 57 the appellants make an argument under the title *"Nature of the Commission's Power"* which appellees understand to mean that the case of *Olson v. United States,* 292 U. S. 246, 257, is advanced as authority for the proposition that the Commisison may, in the discharge of its duty to ascertain and fix rates of mail pay which will comply with the duty of the United States to pay just compensation, disregard an approximately correct ascertainment of the cost of the service and a return upon the value of the property used; and substitute instead as the measure of just

compensation the amount of revenue derived by the carrier from other classes of its service, although those other classes of service are admittedly operated at a loss.

In the first place appellees respectfully submit that the case cited does not stand for any such proposition, because *Olson v. United States, supra,* was a case involving the question of the elements of value to be considered in arriving at the value of shorelands bordering the Lake of the Woods in Minnesota, and what the Court said in that case was that there were no "prevailing prices" by which to measure the value, *hence market value must be estimated.*

Indeed this very *Olson case* seems to be so much better support for the appellees' case than for the appellants' argument that it is probably well to make the following quotations from it:

> "Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure (United States v. New River Collieries Co., 262 U. S. 341, 344, 67 L. ed. 1014, 1017, 43 S. Ct. 565) is lacking, *the market value must be estimated.* • • • In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 124, 68 L. ed. 934, 941, 44 S. Ct. 471. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such

> general notoriety as not to require proof. *Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration* for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth." (Italics supplied.)

Like the *Olson* case evidence of anything which could reasonably be termed "prevailing prices" within the meaning of that decision is here lacking, hence has been approximated by the cost study, although it may be remarked as a merely incidental matter of fact, the Commission has in several instances fixed higher rates (see the table with citations on page 93 herein) for the same size of mail service units for other weak carriers, with which the Georgia & Florida is more nearly comparable than it is with the large Class I railroads with which it has been arbitrarily bracketed. However, any reasoning on the consideration of those rates as "prevailing prices" would merely go around in a circle because the Commission fixed them in all instances.

The cost study in this case, after allowing for all adjustments claimed by the Post Office Department is one which, under the rule in the *Olson case,* has in fact "taken into account all the considerations that might fairly be brought forward and reasonably be given substantial weight," and has been described by the lower court as "the fairest method that has been devised" (R. 57). Appellees fail to see, however, how it can be logically maintained that the fact that they

lose less on one class of service than from another class can be said to prove that they are getting all they are entitled to from the service on which they lose the least. It is a fact that the Georgia & Florida is a weak and needy road which is failing to earn an adequate return from its various classes of service, and it would be ideal if each class of service could be put on a paying basis, and to that end the appellees are constantly striving, but the fact that there is a relatively greater deficit from services other than mail, is no reason why the mail service should not pay its own way.

The appellees respectfully submit that the circumstance that other classes of service also lose money is not one which would in any way justify the Commission in disregarding the cost study when indeed the very object of that study in this, as in all other cases, was to so separate and allocate costs and use of property as to permit a determination of the rates of pay required in order to meet the duty of the United States to pay just compensation for the mail service on its own separate merits. *The Court below properly disposed of this contention when it said:*

"The fact that this railroad lost more money on other services rendered by it * * * * do not refute or impair the fact that the compensation allowed this railroad for the transportation of the mail does not equal the cost of so doing" (R. 30, 56).

(2) *Comparisons with Other Railroads:* The real point in this case is whether the Commission, under a claim that "the weight to be accorded by the

Commission to the cost study, like the question of the weight to be accorded any other item of evidence, is peculiarly for the Commission" (appellants' brief, page 39), can disregard an agreed cost study on a standard basis laid down by the Commission, and arbitrarily substitute instead the same rates prescribed in another proceeding for all lines over 100 miles in length, which rates admittedly were "based upon findings as to the average cost of transporting the mails on all railroads throughout the United States" (appellants' brief, page 8).

That the circumstance that this carrier had heretofore been grouped with lines over 100 miles in length was a controlling consideration with the Commission in its first decision is manifest from the language of its concluding findings and from the language of its order. Is this any less so now?

The brief for the appellants, at page 63, undertakes to show that in its second report the Commission has gotten around that difficulty by omitting in its new findings any express reference to the fact that its decision is controlled by the rates paid other lines over 100 miles in length. The language of the appellants' brief is this:

> "The lower court held immaterial what it stated to be 'The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit.' (R. 56). The report of Division 5 made some reference to rates paid railroads other than applicant. *The report of the entire Commission, however, on rehearing*

made no such reference, but confined its analysis to the evidence of operations by applicant only." (R. 63.) (Italics supplied.)

The appellees respectfully submit, however, that despite the excisions and revision made by the Commission in its second report, nevertheless this circumstance was the controlling reason for the Commission's action in this case, as it believes the following review will demonstrate:

(a) In the first place it must be borne in mind that the Post Office Department in the original hearing did not combat the cost study or argue against the weight to be attached to it. *The Post Office Department's real position* was indicated in the original hearing of June 29, 1932 in the words of its attorneys as follows:

> "There has been some reference made to this road being a group of short lines and always being associated with short lines, and with the idea in mind, as we understand it, that they may now be treated similarly to the short lines in receiving special rates. *We fear if this were permitted that it would open the door to applications by all roads similarly situated that are small Class I roads.* Not only that, but the Department would feel bound to take up with the Commission the question of revising the rates as to other roads which show an excess of earnings above the limit practically fixed by the Commission. This exhibit is therefore offered in the nature of information to the Commission so that they will understand that whatever action is taken in this case may be rather far-reaching." (R. 80.) (Italics supplied).

(b) In the second place as the appellants' brief page 8, expressly recites "the present rates received by the Georgia & Florida were based upon findings as to the average cost of transporting the mails on all railroads throughout the United States other than electric urban and interurban railroads."

(c) In the third place on page 10 of their brief, as a foundation for their reasoning the appellants argue that "It may be *assumed* that the rates prescribed in the 1928 *Mail Pay case* were, *when fixed*, just and reasonable. To determine whether they *still are* requires an analysis similar to that made at that time so far as data are available."

(d) In the fourth place the Commission's second order, as well as the first, plainly reveals that the Commission's conclusions giving no weight to the cost study have been dominated by the consideration urged by the Post Office Department, namely, the preservation of classification. The language of the order is significant in its very reading by the words:

> "It is ordered, That the rates of pay for the transportation of mail matter *established in Railway Mail Pay*, 144 I. C. C. 675, *for railroads over 100 miles in length be*, and they are hereby, established as fair and reasonable rates to be received by the applicant herein for services rendered on and after April 1, 1931." (R. 51.) (Italics supplied).

(e) In the fifth place the appellants' brief, on page 61, expressly makes argument under the special heading "*IV. The classification of roads over 100 miles in*

length different from those under 100 miles in length was reasonable."

In this last connection, the following words of the Commission's first decision are significant.

> *"The data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service."* (Italics supplied.) (R. 10.)

The logic of the foregoing citations is that in the weight it has not given to the cost study the Commission has continued to be influenced by reluctance to take this carrier out of the general classification with other lines over 100 miles in length. The reasoning of the appellants' brief, pages 10, 11, 17, 61 and 63, which apparently stems from that consideration, involves two propositions which the appellees respectfully submit are erroneous, namely:

(a) The Commission is certainly not entitled to disregard the weight of the cost study on the theory that the appellees must overcome a presumption favoring the pre-existing rates for the Georgia & Florida "based on the average cost for transporting the mails on all roads throughout the United States."

There is of course no such rule of adverse presumption to debar a person entitled to receive just compensation from the government.

(b) The Commission is also not entitled to disregard the weight of the cost study because the Commis-

sion has heretofore made so few exceptions to the principle of fixing the same rates for all lines over 100 miles in length on an average of all their costs.

The Principle of Reasonable Classification: The carrier does not question the general principle that classification for some purposes is proper, but it claims the right to have its compensation fixed so that it will be compensatory to itself on the evidence of the separate cost study agreed upon with the Post Office Department. It is also expressly given that right to just compensation for itself by the statute itself (July 18, 1916, chap. 261, section 5, 39 Stat. 430); and furthermore is entitled to its just compensation as a matter of constitutional right guaranteed to it by the Fifth Amendment of the Federal Constitution. Speaking of this Mail Pay Act, this Court, in *United States v. New York Central R. R.*, 279 U. S. 73, said:

> "Naturally, to save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive reasonable compensation."

While the Court used the plural word "railroads" it was because there were a plurality of railroads involved in that case; but it cannot be doubted but that the principle is equally applicable to any individual railroad.

It is true that in the last general mail pay case decided July 10, 1928 (144 I. C. C. 675), the Georgia & Florida was an unfortunate victim of classification, i. e., where the cost ascertainments for carriers over 100

miles in length as one major group indicated that an increase of 26.61 per cent was necessary, they were given 15 per cent while for the lines under 100 miles in length as another major group an increase of 91 per cent was indicated to be necessary and they were given an increase of 80 per cent.

The Georgia & Florida made the same cost study at the same time as the others, and pleaded, unsuccessfully, for special treatment or to be put in the short line group, the increase then indicated as necessary for it being 78 per cent. By the process of classified grouping, however, it was at that time put into the major group of the large roads which were given an increase of only 15 per cent. (See page 95 herein.)

However the appellees respectfully submit that there is a fundamental distinction between (a) those general cases where the law *empowers* the Commission to make classifications, and (b) the present individual case in which the law and the Constitution make it *the duty* of the Commission to determine the rates of pay for this particular road upon the evidence in respect to it alone; and the Commission has no lawful right to force onto the Georgia & Florida confiscatory rates of pay *fixed by averages in some other case* which is not a part of this record and has no place or part herein.

The case of *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 447, 72 L. ed. 357, 364, although the facts are the converse of the situation, contains much in point. In that case this Court said:

> "No company receiving just compensation is entitled to have higher rates merely because of the

> plight of its less fortunate competitors. Companies whose constitutional rights are not infringed may not better their position by urging the cause of others. *Albany County v. Stanley,* 105 U. S. 305, 311, 26 L. ed. 1044, 1049; *Heald v. District of Columbia,* 259 U. S. 114, 123; 66 L. ed. 852, 854, 42 Sup. Ct. Rep. 434. As a practical matter of business, it is impossible in the long run for some companies to collect higher premiums than those charged by others in the same territory. *Rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others.* But the latter have no constitutional right to prevent their enforcement against the former." (Italics supplied.)

The converse of the Court's statement is equally true that no railroad company failing to receive just compensation for transporting the mails is required to accept a confiscatory rate merely because the rate may yield adequate returns to some fortunate companies with which it is classified.

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(3) *Cost Study as an Approximation:* Appellees do not quarrel with the proposition that the cost study is not a *mathematically exact* ascertainment of the precise cost of service, but respectfully submit *it is an approximation* which furnishes a sufficiently reliable basis for sound conclusions and assert that if it errs at all, it does not err in favor of the appellees.

The Commission has heretofore expressly said, in many previous decisions, that this very method of cost ascertainment is a sufficiently reliable basis for conclusions as to the reasonableness of the rates of pay;

for instance, in *New England Railway Mail Pay*, 85 I. C. C. 157, 179, Division 1 of the Commission said:

> "The space ratios and the apportionments of expense and investment based on such ratios cannot be regarded as exact mathematical ascertainments of the cost of the mail service to the carriers. *They furnish, however, a sufficiently reliable basis for conclusions as to the reasonableness of the present rates of pay.*" (Italics supplied.)

That statement was cited with approval in *Railway Mail Pay of Woodstock Railway Company and White River Railroad Company*, 96 I. C. C. 43, 46, and substantially similar statements were made by the Commission in the *Winston-Salem Southbound Railway Mail Pay Case*, 123 I. C. C. 33, 40, and *Railway Mail Pay*, 144 I. C. C. 675, 691.

Terming the cost study in the present case an "*approximation*" does not seem to have been expressed in just that way in other cases, for the language in previous decisions has been that "the cost study furnishes a *sufficiently reliable basis*" or a "substantial basis" for conclusions as to the reasonableness of mail pay rates. The three terms are not greatly different, however, and the word "approximate" has been defined by the courts. In *Ross v. Keaton Tire, etc., Co.* (1922), 57 Cal. App. 50, in which there was involved a promise to pay rent at the rate of 8 per cent on cost of a building to be erected and "to cost *approximately* $21,000.00," the Court held that the actual cost of $31,857.00 was not approximately $21,000.00. The Court said "The word 'approximate' is defined '*to come close to*, as in quality, degree, or quantity; approach closely without

coinciding with exactly,' or reaching the specified amount or quantity. *(Bloomington Canning Co. v. Union Can Co.*, 94 Ill. App. 62.)''

In *City of Richmond v. I. J. Smith & Co.*, 89 S. E. 1923, 119 Va. 198, involving the excavation of bridge foundations to bed rock, the depth of which was given as ''approximate,'' the Court said, ''When, therefore, the line of bedrock was given as 'approximate,' it was intended to express the idea that the line as shown upon the profile was *nearly, but not exactly,* correct. See Webster's International Dic.''

In *Worcester Post Co. v. W. H. Parsons Co.*, 265 Fed. 591, it was held that a contract for sale and delivery of ''approximately'' 45 tons per month did not permit of any substantial variation or departing from that number without consent.

All Other Mail Cost Ascertainments Have Been by the Same Methods: Furthermore that there should be no real difficulty over the cost ascertainment in this particular instance, on the Commission's own formulas, is apparent from the manner in which the Commission has repeatedly dealt with cost studies on precisely the same formulas for roads, both larger and smaller than the Georgia & Florida; and to bring that out plainly the following review of the Commission's treatment of this same kind of cost ascertainment in some of the previous mail pay decisions will be enlightening:

The First General Mail Pay Case: In the first general railway mail pay case (decided December 23, 1919, 56 I. C. C. 1), there was nothing in the deci-

sion which would determine the percentage of increase other than that the new rates which were prescribed and the figures there shown are the result of applying to the authorizations for 35 days in 1917 both the old and the new rates effective, first, from November 1, 1916 to January 1, 1918, and, second, the rates in effect after January 1, 1918 which were increased 25 per cent over the rates prescribed November 1, 1916 to January 1, 1918. The rates prescribed for the first period represented an increase of 28.61 per cent, while the rates prescribed for effect January 1, 1918 represented an increase of 60.76 per cent.

In that said first general railway mail pay case no separate ascertainment was made in the Commission's report to show the per cent of indicated need for any individual lines, or even as between Class I roads and Class II and Class III roads. After prescribing the same basic rates of pay per units of space, a percentage was added for Class II and Class III lines less than 100 miles in length, of (a) 20 per cent for such short lines over 50 miles in length, and (b) 50 per cent for those of less than 50 miles, together with a minimum amount per mile per annum.

The Second General Mail Pay Case: In the second general railway mail pay case (decided July 10, 1928, 144 I. C. C. 675), the same sort of cost studies indicated (for those lines which made such studies) the per cent of increase needed by each separate line, but the Commission used its power *(in that general case)* to classify. It found that for Class I roads, and roads over 100 miles in length, as one major class, the *average* per cent of increase indicated to be necessary was

26.61 per cent, and on that showing it prescribed *an average* increase of 15 per cent; while for Class II and Class III lines less than 100 miles in length, as another major class, the Commission found *an average* of 91 per cent increase was indicated to be necessary, and on that showing it prescribed *an average* increase of 80 per cent.

Intermountain and Pacific Coast Short Lines (95 I. C. C. 493): The roads in that case were 23 short line railroads in intermountain and Pacific Coast territories. They ranged in length from 6 to 166 miles. For the 23 roads as a whole the mail space ratio was 9.65, and the amount of unoccupied space apportioned to mail in the cost ascertainment was equivalent to 69.61 per cent of the mail space authorized (112 I. C. C. 151, 154) and an increase of 100 per cent was awarded; whereas in this case of the Georgia & Florida the mail space ratio was 12.96 and the corresponding ratio of unoccupied space was 76 per cent, but no increase whatever was awarded.

Alabama, Tennessee & Northern Railroad (112 I. C. C. 151): The per cent increase indicated necessary by the same sort of cost study was 134.3 per cent and an increase of 100 per cent was ordered.* In that case

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* "In *Railway Mail Pay*, 95 I. C. C. 493, we found rates of mail pay unreasonable and established rates *100 per cent greater*. The roads in that case were 23 short-line railroads in intermountain and Pacific Coast territories. They ranged in length from 6 miles to 166 miles. The rates of mail pay found unreasonable upon the roads in that case over 100 miles in length were the same as those now in effect upon the applicant in the instant case. For the 23 roads, as a whole, the mail-space ratio was 9.65 as compared with 16.13 for the Alabama, Tennessee & Northern. For the 23 roads the amount of unoccupied space apportioned to mail in the cost ascertainment was equivalent to 69.61 per cent of the mail space authorized. In the instant case the corresponding figure is 33.64

the mail space ratio of the Alabama, Tennessee & Northern was 16.13, and the amount of unoccupied space apportioned to mail in the cost ascertainment was equivalent to 33.64 per cent (112 I. C. C. 151, 154).

Winston-Salem Southbound Railway (123 I. C. C. 33): The per cent of increase indicated to be necessary was 146.7 per cent, and the increase awarded was 50 per cent.* In that case the mail space ratio of the Winston-Salem Southbound was 13.17 per cent, but the amount of unoccupied space apportioned to mail was 177 per cent, which the Commission expressly found to be excessive, due to extraordinary conditions which were relied upon to justify a large discount (123 I. C. C. 33, 39). In the case of the Georgia & Florida that ratio was but little more than a third of that of the Winston-Salem Southbound, and there was no finding that the Georgia & Florida ratio was excessive.

Furthermore, in the Winston-Salem Southbound case it appeared that it was a road owned jointly by two trunk line systems, the Atlantic Coast Line and the Norfolk & Western.

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per cent. An increase in the mail pay rates now accorded the Alabama, Tennessee & Northern, *to the basis established in the case* cited (Note: 100 per cent increase) would be sufficient to pay the operating expenses chargeable to the mail service and *some* return upon the mail portion of the investment in road and equipment." 112 I. C. C. 151, 154. Note and Italics supplied.)

* "We are of the opinion that the rates of pay now accorded the Winston-Salem are not fair and reasonable, and that increases are justified. The mail-space ratio under present methods of operation is too high (note: 177 per cent), due to the operation of an unnecessary amount of unused space. We do not believe that it is possible to operate without some unused space, but the amount should be kept within reasonable limits. The rates established herein take this into consideration." 123 I. C. C. 33, 40. (Note supplied.)

Denver & Salt Lake Railway (151 I. C. C. 734): This was an interesting instance of a *Class I road* (which had been previously excluded from the second general Mail Pay Case because it was already being paid special compensation by the Post Office Department under an individual contract)* and in its subsequent individual case the same kind of cost study as that made for the Georgia & Florida indicated that the *per cent increase necessary was 68 per cent, and the increase awarded was 60 per cent.*

It could be argued that the Denver & Salt Lake Railway was an exceptional case that was entitled to being paid higher rates than were prescribed for all other Class I carriers; appellees freely grant that this is so, but maintain that the Georgia & Florida is entitled to have due weight given to the evidence of record.

The Lower Court's Considered Conclusion: The lower Court had before it the explanation given by the Commission in its second decision and, after listening to oral argument, disposed of this contention as follows:

> "Neither applicant nor this Court entertains the view that the hypothetical cost is 'necessarily conclusive.' It is merely the fairest method that has been devised. If 'actual cost' as to each item be

* "The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor." *Act of July 28, 1916, 39 Stat. 412.*

required applicants would be helpless and the Commission would be reduced to guessing." (R. 57.)

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(4) *The Thirty-foot Partition Fallacy:* Appellees dispute the accuracy of the statement in the Commission's report upon rehearing (R. 45) that the operation of the 30-foot railway post office apartment, instead of a 15-foot authorized space "results in the operation of an amount of unused space equal to the authorized 15-foot apartment and thus increases the amount of space and the expense apportioned to mail."

The lower court perceived the fallacy in the Commission's position on this point and said:

> "Further argument of the Commission, as we understand it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the Post Office Department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed" (R. 57.)

However, this is the one point upon which there was some new evidence in the second hearing, and the brief for the appellants seizes upon a meagre fact to multiply argument at such length that by way of precaution it will have to be adequately noticed:

The real essence of the question is as to whether if as the result of the location of the partition, in the words of the lower court (R. 58), an unnecessarily large car is used and this adds to the portion paid by the

mail for unused space and that if 15 feet were eliminated from the car the mail space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of $1,711. (*Note:* Before any return on investment.)

There was nothing in the record on the original hearing on the point of the furnishing of a 30-foot railway post office on an authorization for only 15 feet, although the test was conducted under the supervision of experienced representatives of the Post Office Department, and if the fact had been of the slightest consequence it would undoubtedly have been brought out in the beginning. It was not even brought up, and there is not one word in the record to indicate that the furnishing of a 30-foot railway post office on an authorization for only 15 feet would adversely affect the Department's proportion in the cost study. It was the Commission in its second decision, and not the experienced practical men of the Department who know better, that has seized upon this fallacious argument. The only place in the record where the Commission can go for any evidence on this point is the testimony of Witness Fulghum, and to demonstrate how really weak is the Commission's foundation all of his testimony which has any direct or indirect relation to that point as shown by the record, is as follows:

(Directly on the point)

"The 15-foot apartment unit is authorized in those trains daily, because that is the minimum unit which may be authorized. *On the date of the inspection we were operating a 30-foot apartment car.* (Italics supplied.) (R. 97.)

(Not really on the point)

"A 15-foot apartment car of standard size and specifications provides storage space for an estimate of 50 sacks of mail. I think the actual linear feet of storage space is perhaps 3.2. Asking what we do, if we have 51 sacks of mail: If the car operated is of the type and size operated, there is no restriction as to the use of the facilities which it provides. If there are only 10 sacks in there, why, we pay for it, and if we can get 60 in there, why, we have the privilege. As to oversized cars: The situation is different; if the company supplies an oversized car in lieu of a car of the size authorized, we are restricted to the use of the actual facilities provided in a car of the size authorized. In other words, we are not permitted to take more than 50 sacks of mail into the car, if it is an oversized car, without paying additional space. If we have more than 50 sacks of mail, we have to authorize additional storage space, an emergency unit; of course, in some cases where oversized cars are operated regularly, storage units are authorized in connection with them. The minimum unit of authorization is 3 feet. I think this 30-foot R. P. O. car operated on this particular line is regular. That is, we regularly authorize 15-foot R. P. O. and the railroad furnishes us with a 30-foot R. P. O. apartment, non-standard. It is preferable that the Post Office Department be furnished cars of the size authorized, but they do not enter any objection when oversized cars are operated. (R. 98.)

"'Q. (By Mr. Hitt) What is the advantage, Mr. Fulghum, in having a smaller space? Is it not more advantageous to have more separations and larger space in which to make your separations?

"'A. Because when the authorization is for a 15-foot apartment car unit, very few separations are needed, and a car of larger size just is excess baggage to walk about in.

"'Q. Just a little bit more space, but it does not offer any other disadvantage?

"'A. It does, to some extent, because clerks are required to keep record of all mail that comes in there. They have to keep account of it. That is something else in addition to any number of other things. They have got to keep track of it and a record of the sacks and outside parcel loadings to do it.' (Tes. 9226-9234.)

"In other words, in order to determine if you exceed a storage space of 15 feet, and another thing, in using distribution facilities, you have got to be sure that they confine themselves to 144 letter box separations and 49 paper and pouch separations. They may not use the remainder of the 30-foot car. Asking whether the railway mail service on the Georgia & Florida could be performed in a smaller unit than 15 feet: If there was such a unit, one would be applicable to that line. If there were a 12-foot apartment unit, it could be done in that, because, as I have shown here, the distribution facilities, or storage space used will not average over 50 per cent limit, taking the cars and the maximum volume received on any portion of the line. I cannot answer as to what is carried in the other end of that car; I presume they carry baggage and express, but I am not sure.

"(Statement by Mr. Todd:) On No. 4 and 5 it is just baggage and express." (R. 97, 98.)

It is to be noted that there is not one word of testimony in the extract quoted above to the effect that

the furnishing of the 30-foot apartment unit instead of a 15-foot apartment unit created unused space. The witness said that perhaps a 30-foot apartment was not quite so convenient for the Post Office Department, and that caused a little more work to keep a record of the mail handled, but not a word to the effect that the position of the partition in the car in any way enlarged the quantity of the unused space in the car.

The other end of the car, containing the mail apartment space, is used for baggage and express, and during the test period 43.2 per cent of the space in those 55-foot cars was unused space (R. 7). There was therefore unused space outside of the partition as well as inside. If the baggage and express had been so voluminous that the position of the partition in the 30-foot apartment car had forced the carrying of some of it in other cars in the train, it might then have been said that the position of the partition had an effect upon the quantity of unused space. But there is nothing in the record to indicate that the position of the partition had any such effect upon the waste space. Indeed the very fact that the partitions were allowed to stand unchanged, in itself, demonstrates that the space wasn't needed for other purposes. On the evidence after hearing arguments, the lower court in its second decision quoted with approval its finding in its first decision that—"There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance" (R. 56); and also said additionally—"There is no criticism of the 'character of the service performed in connection with transporting the mail'." (R. 57.) (Compare *Winston-Salem Southbound*, 123 I. C. C. 33, where the Commission did find

there was an excessive amount of unused space. See table on page 93 herein.)

This point was fully argued before the lower court, and since this is the only contention which the appellants have advanced, which, if correct, would serve to take anything from the weight of the cost study, there is included herein a diagram which pictorially and mathematically demonstrates the fallacy here involved.

The Lower Court's Considered Conclusion: On this contention, which was fully urged before it, the lower Court said:

> "Further argument of the Commission, as we understand it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed." (R. 57.)

Even if this fallacy were accepted and adjusted for 100 per cent, it would certainly not be sufficient to justify the discard of the cost study, for, as clearly appears on page 52 of appellants' brief, if the entire 15 feet of unused space in the oversized apartment is eliminated from the unused space charged to the mails, and entirely put over against other passenger services, the operating deficit computed from the studies before the Commission of $4,945.00 becomes an operating income of $1,711.00 similarly computed. It is obvious that even that falls far short of the fair return that

ICC 9200
Georgia & Florida
Argument Exhibit 12
1-9-36

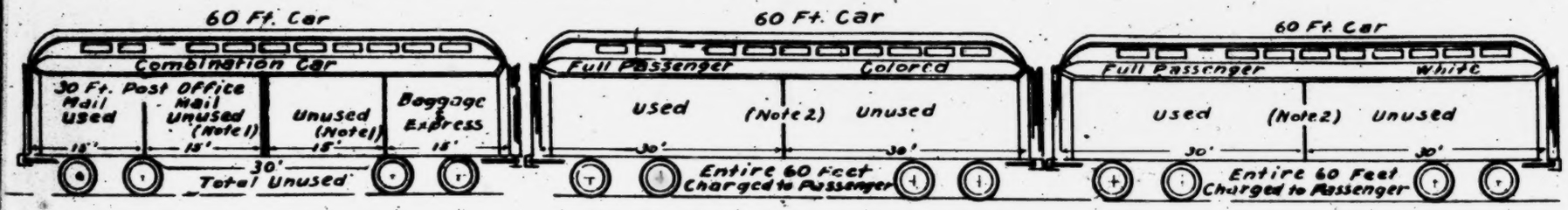
DEPICTING THE PRINCIPLE OF THE APPORTIONMENT OF UNUSED SPACE IN COMBINATION CARS ACCORDING TO THE COMMISSION'S STANDARD BASIS

DEMONSTRATION OF THE "30 FOOT APARTMENT" FALLACY

(Contention on this point was not even raised in the original proceeding and when injected in the re-opened proceeding, serves only to unfairly cloud the issues)

THE PROPORTIONS USED FOR THIS GRAPH ARE NOT ACTUAL

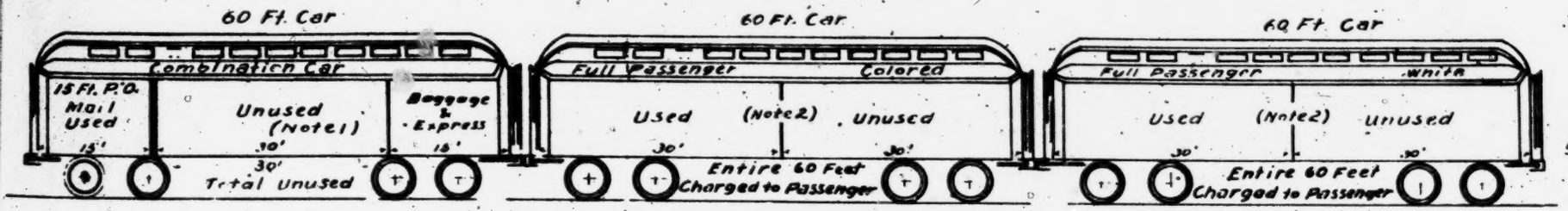
When a 30 Foot Post Office is Furnished on a 15 Foot Authorization



MATHEMATICALLY DEMONSTRATED

1 Combination Car-60 Ft.	Ft.	Percent	
Mail Used	15	8.33⅓	16.66⅔
Mail Unused	15	8.33⅓	
Bag. & Exp. Used	15	8.33⅓	
Bag & Exp Unused	15	8.33⅓	
2 Passenger Cars — 120 Ft.			
Passenger Used	60	33.33⅓	
Passenger Unused	60	33.33⅓	
Total -----	180	100.00	

When a 15 Foot Post Office is Furnished on a 15 Foot Authorization



1 Combination Car-60 Ft.	Ft.	Percent	
Bag & Exp. Used	15	8.33⅓	16.66⅔
Mail Used	15	8.33⅓	
30 Ft. Unused Mail Proportion	15	8.33⅓	
Bag. & Exp. Proportion	15	8.33⅓	
2 Passenger Cars -120 Ft.			
Passenger Used	60	33.33⅓	
Passenger Unused	60	33.33⅓	
Total -----	180	100.00	

*The Mail's Proportion of Total Train Space in each example is exactly the same

(Note 1) No other unused space is charged to Mails

(Note 2) All space in Full Passenger Cars is charged against Passenger Service, even if only partly loaded

(On no day during the Test Period of the Georgia & Florida Railroad was there insufficient space in the Combination Car for Baggage and Express)

THE AMOUNT OF UNUSED SPACE IS THE SAME REGARDLESS OF THE POSITION OF THE PARTITION

The proportion of space chargeable to the Mail is the same (16.66⅔%) regardless of the position of the partitions, for, if the amount of unused space in a combination car was 30 ft. anyhow, obviously it could make no difference if a car with a 30ft. partition was supplied on an authorization for only 15 ft., since the total excess space is just the same

is guaranteed by the Constitution, as correctly pointed out by the court below:

> "We find nothing that warrants any change in our conclusions as to the legality of the order now before us from our previous conclusion as to the same rates except the fact, stated by implication, that the use of a mixed car shorter by 15 feet would result in a profit from mail revenue of $1,711 annually. The report discloses 'The total mail service investment thus derived was $457,082.' This return is approximately .0037 per cent. This is not 'fair and reasonable'." (R. 58.)

And furthermore the appellees invite attention to the fact that the ratio of unoccupied space in *Intermountain and Pacific Coast Lines*, 95 I. C. C. 493 was 69.61% and they were given an increase of 100%, and in the *Winston-Salem Southbound case* the ratio of unoccupied space was 177% and yet they were given an increase of 50%.* The Georgia & Florida's corresponding ratio of unoccupied space in the test period including the 15 feet of unused space in the 30-ft. apartment was only 76%, or less than 6 points greater than those roads which got a 100% increase, and less than half of that for a road which got an increase of 50%.

(5) *Three-foot Closed Pouch Units:* While there was no new evidence upon the point at the second hearing, the appellants attempt to make much of the fact that actual use of the 3-foot closed pouch units was considerably less than the maximum capacity of the author-

* "We do not believe that it is possible to operate without some unused space, but the amount should be kept within reasonable limits. The rates established herein take this into consideration." *Winston-Salem Southbound*, 123 I. C. C. 38, 40.

ized space. This is in spite of the fact that the Commission in both of its reports stated that it is customary in the cost studies in all the mail pay cases for authorized space to be considered as the used space, whether it is fully used or not. The reason for this is explained on page 9 herein. 95 I. C. C. 493,496. The 3-foot space is of course the smallest amount of service which can be authorized. During the test period only 5 per cent of the mail service was in such units, and the Commission pointed out in its first report that:

> "In this instance, probably, *the difference in the result for the test period would not be great because of the small amount of closed-pouch space in relation to the total in the test period.* Applied to operations for a full year, however, the difference probably would be considerable." (R. 9.) (Italics supplied.)

While it is perhaps true, as stated by the Commission, that on a calculation extended to operations for the full year 1931 the difference in the space ratio caused by the failure of the Post Office Department to use the 3-foot units to maximum capacity would be considerable, in its second report upon rehearing the Commission quite left out the fact that during the representative test period the 3-foot closed pouch service had dropped to only 5 per cent of the total mail service (R. 50). (The discontinued mail service and the time of discontinuance is shown on the chart, Exhibit 725, appearing at R. 129.) It is of course the actual condition as correctly represented by the conditions which existed in the test period, namely, when the 3-foot closed pouch units represented only 5 per cent of the mail service, which should have been the basis for any

argument instead of a 27.65 per cent ratio which had ceased to exist.

Therefore, appellants' extended argument on this insignificant detail, even if it were sound, which appellees deny, is obviously insufficient as a justification for the Commission's failure to give weight to a cost study made with an accuracy testified to and agreed upon by witnesses both for the Post Office Department and the carrier, which cost study indicates the need of an approximate increase of 87.40 per cent to yield the railroad the cost of carrying the mail and a fair return upon the property devoted to its transportation.

Furthermore as has already been pointed out herein, a theoretical three-foot unit of closed pouch space authorization is not fixed upon the theory of any minimum quantity, or that maximum use would be made of the entire capacity. It simply represents the smallest unit for any railway mail service at all and that minimum unit was doubtless fixed by the Commission with full appreciation of the fact that in few, if any, instances would the actual service ever be exactly equal to the maximum capacity limit beyond which the Post Office Department would have to make an authorization for a larger unit of space. Nor is that condition peculiar to minimum 3-foot units. Pay for seven feet is required whenever the 3-foot maximum of 56 sacks or the equivalent is exceeded, although the excess might not be more than 5 sacks; and so on up the scale.

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(6) *Speculations v. Test Period Ascertainments:* The appellees freely admit the *theoretical* possi-

bility that the changes in mileage and service which may have occurred since the test period in 1935 might effect a somewhat different result, but as a *practical* proposition the original parties to the cause; i. e., the appellees and the Post Office Department, as already pointed out, are content to rest upon the figures developed by the test period in 1931.

It is just because there are variations in conditions from day to day that the Post Office Department and the appellees in making the test in 1931 subjected the facts of the actual performance to thorough investigation for 28 consecutive days, and the results were adjusted and agreed upon by both parties as being representative of average conditions for an entire year.

Argumentative speculations are entitled to no weight because the effect of one change is likely to offset the effect of some other change, and even if there were any evidence to justify different rates of pay in subsequent years, the duly would still remain on the Commission to decide on the rates of compensation for the period beginning April 1, 1931, on the agreed evidence of the test period at that time.

The fact remains that there is a customary method of working out these cost studies, and the Post Office Department has highly skilled technicians who specialize on same; and who can be relied upon to see that no undue concession is made to the railroads either in conducting the actual test or in working out the results of the tests.

In this case the Department did claim some substantial adjustments of the test period figures to conform to

statistics for a year's operation to which the carrier agreed, and after giving full effect thereto, their own exhibits showed an indicated need of an increase of 87.40 per cent; and furthermore, the expert witness for the Department has in both hearings admitted on examination by his own counsel that this cost study was the most equtable basis he could devise. (R. 96.) (Compare *Olson v. United States*, 292 U. S. 242, 262.)

(7) *Train Lot Comparisons:* Beginning on page 53 of appellants' brief a quotation from the Commission's report upon rehearing is followed by a discussion of the Commission's reasoning. The entire discussion, however, is highly theoretical and contains mathematical computations based upon the premise of how close would the mail come to paying its own way if it were carried in solid trainloads at the present rate of pay. By this mathematical prestidigitation it is made to appear that the carrier gets 1.0297 cents per car-foot mile for authorized mail service as compared with an average computed expense per car-foot mile of only 0.6573 cents based on the total car-foot miles operated in the entire passenger train service. It can be just as easily proved, using one linear foot of car space per passenger, that if a train ran filled to capacity with passengers the railroad would receive 2.8903 cents per car-foot mile for the transportation of each passenger, as compared with the expense per car-foot mile for passenger service as a whole of .6573 cent. (R. 118, Exhibit 765, R. 288.) That whole argument is useless because the Georgia & Florida Railroad does not carry either mail or passengers in full trainloads, and the Court properly rejected it (R. 58).

The appellees respectfully submit that what the appellants argue for and the Commission has done is directly contra to the rule declared in the *Olson case, supra,* that "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment to truth." (292 U. S. 242, 262, 78 L. ed. 1245.)

The Lower Court's Characterization: Having before it the Commission's explanations and arguments orally and by briefs, the lower Court disposed of these speculative arguments (6 and 7) in the following words:

> "Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed 'to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively, but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned' in accordance with the formulas prescribed for Class I roads for the separation of expenses between freight and passenger service." (R. 58.)

D. On the Alleged Insufficiency of the Bill of Complaint

Appellants in their brief (Page 58), under the title "III. The Commission did not commit any error in its

construction of the law as applied to the facts in this case", urge the insufficiency of the pleading in the supplemental petition to support a charge of confiscation. The paragraph quoted from the supplemental bill, which is subdivision (6) of Paragraph IV, reads as follows:

> "(6) The carrying out of said order against petitioners deprives them of their property without due process of law and will take the private property of petitioners for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States." (R. 40.)

Appellants did not argue any such question of pleading before the lower court, and therefore it would seem that they have waived any such question and are precluded from raising it now.

In any event, appellees do not agree that there are not sufficient allegations of fact to support a charge of confiscation. The supplemental bill recites first that the lower court in its first decision found that the rates fixed by the Commission in its first order were confiscatory, and then averred that no evidence was adduced at the rehearing which could change the confiscatory nature of those rates, in spite of which the Commission again ordered the same confiscatory rates, and the rates are still confiscatory (R. 35). If the rates were once confiscatory, and if nothing had happened to change that fact, they would still be confiscatory, and all of that is set out in the bill.

Furthermore, the cases which are cited by appellants do not stand for the proposition that after bill and

answer and proof, a petitioner fails because "the bill of complaint does not show the value of property employed, the expenses of operation, or the return which would be permitted under the rates prescribed:"

Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151, 78 L. ed. 1182, held that the Illinois Bell Telephone Company simply did not establish by proof *on hearing* that the reduction in its rates would bring about confiscation. *Nothing was said about any alleged defect in pleading.*

In *Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, there had been no hearing and no proof adduced, and the appeal was merely upon the denial of a motion for an interlocutory injunction. All the case stands for is that to support a motion for a preliminary injunction enough primary facts must be alleged to support a conclusion that confiscation will take place if preliminary relief be not granted. There was nothing in that case to indicate that had the appellant proved the facts of confiscation at a hearing on the merits it would not have been entitled to relief merely because the bill of complaint did not enumerate all of the facts necessary to be proved.

In *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 72 L. ed. 357, it was held in view of the fact that the bill did not allege any facts to show that certain uniform rates prescribed by the State authorities would result in confiscation, therefore the lower court had been justified in treating the suit as one to obtain a review under the State law.

In *Baltimore & Ohio R. R. Co. v. United States,* 298 U. S. 349, 80 L. ed. 1209, the Court held that the *evidence* was not sufficient to establish with reasonable certainty what had been or would be the cost of the service covered by the divisions, and the decision contains nothing which stands for the proposition that the appellants in that case failed because of any deficiency in the pleadings.

In *San Diego Land & Town Co. v. Jasper et al.,* 189 U. S. 439, it was held that if the plant had been built to a capacity greatly in excess of the needs of the public, the value of that excess plant cost could not be included to prove there was confiscation at the rates allowed, for the proper amount of service needed; and there was nothing in that case to show that it was decided upon any defect in pleading.

In *Smyth v. Ames,* 169 U. S. 466, 546, 547, it is clearly held that the company was entitled to ask for a fair return upon the value of that which it employs for the public convenience *(which is our case),* but nothing is said about any defect in pleading.

In *Public Service Comm. of Montana v. Utilities Co.,* 289 U. S. 130, 77 L. ed. 1080, there is also no reference to any defect in pleading, and it has no relevancy to this case.

It has already been pointed out herein at pages 15 and 45 that upon the Commission's own findings the undisputed evidence on the cost study was that the mail revenue fell short by $4,945 of equalling the per annum cost of the mail service, not including any return

on the property allocated and apportioned to that service, which was shown to be $457,082; and that an increase of $31,227 would be necessary to enable the carrier to earn 5.75 per cent upon that property (R. 7, 8, 29).

E. On the Law of the Case as Established by the Lower Court's First Decision

(Appellants' Assignment of Error No. 5)

The specially-constituted three-judge District Court in its first decision, after stating that no other facts were established or sought to be established than those set forth in the order of the Commission; that the challenge is to the conclusion drawn from undisputed facts; that the facts disclose that for every dollar applicants received for transporting the mail they expended one dollar and 2.79 cents; that there is no attack upon the efficiency of the operation of the railroad and no charge of extravagance; concluded that the bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C., 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of the service, this compensation is not in compliance with the duty upon the United States to pay fair and reasonable compensation and is not just and equitable. The court then decreed that the Commission take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.

With the benefit of the conclusion of the court upon that undisputed evidence that the rates ordered were

not "just and equitable", the Commission should have then proceeded to a determination of the amount of increases which would, on that evidence, have provided compensation sufficient to comply "with the duty on the United States to pay 'fair and reasonable' compensation." (R. 20.)

Instead, however, it reopened the proceedings for further hearing, and in its second decision and order, which gave no effect to the conclusions of the court and the court's decree thereon, the Commission made a revision of its previous findings of fact without there having been placed before it any substantially new evidence sufficient to have changed the court's determination upon all the undisputed facts in evidence, and reached the same conclusion as it had before. Appellants quote the conclusions from the two Commission decisions as evidence that there was no inconsistency in the Commission's findings, but what they quote are the ultimate conclusions and not the findings of the preliminary facts upon which such conclusions were based.

A careful reading of the two opinions shows that in the first opinion the preliminary findings of facts did not support the conclusion but that this was modified to some extent when the Commission revised its preliminary findings in its second opinion without any effective new evidence before it, and then reached the same conclusion as it had before.

As to the nature, however, of the differences between the two findings of fact, appellees respectfully call attention to what the appellants themselves expressly point out at page 63 of their brief, where one part of

the findings in the first decision was excised from the second decision:

> "The lower court held immaterial what it stated to be 'The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit.' (R. 56.) The report of Division 5 made some reference to rates paid railroads other than applicant. *The report of the entire Commission, however, on rehearing made no such reference,* but confined its analysis to to the evidence of operations by applicants only."

In view of appellants' own explanations it seems reasonable to assume that the Commission would have appealed from the first decision of the lower court if it had felt it could prevail upon the basis of its own first findings of fact; and that, in substance, it is now relying mainly upon its revised findings of fact.

Upon this situation the lower court held in its sound decision that—

> *"The law as established in this case by the previous decision,* unreversed, makes inapplicable 'comparisons with compensation received from other services in passenger train cars;' 'comparisons with freight rates;' and 'comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole'." (R. 57.) (Italics supplied.)

Therefore the appellants are driven to argue that "the court's earlier decision did not establish the law

of the case" (appellants' brief, page 67), but the only cases they cite as authority for that proposition are *United States v. Atlanta, B. & C. Ry. Co.*, 282 U. S. 522, 530, 75 L. ed. 519, and *Atlanta B. & C. Ry. Co. v. U. S.*, 296 U. S. 33, 80 L. ed. 25.

Appellees respectfully submit that in that case the first decision by this Court involved only the question of the jurisdiction of a specially constituted three-judge District Court and it was held that a merely "directory finding" in a Commission report was not an "order" which was reviewable under the Urgent Deficiencies Act, October 22, 1913, chap. 32, 38 Stat. at L. 208, 219. What this Court actually said was—

> "We need not determine whether jurisdiction existed to review the action of April 9, 1928, or the scope of the issues litigated in the original suit. For a finding of jurisdiction to review that order, or acquiescence by the defendants in the decree rendered on the original bill, would not have made *res judicata* the question whether jurisdiction existed to review the later action of October 9, 1929. • • •
>
> "The lack of power to review, because of the absence of any order, cannot be cured by bringing the suit in the form of a supplemental rather than a new bill. Jurisdiction is equally lacking in either case."

The second decision by this Court was the first decision on the merits in those *Atlanta, B. & C. Ry. cases* for the order of the Interstate Commerce Commission sought to be enjoined was the first formal order *requiring* certain accounting procedure to be followed.

Of course a decision of a Court in a matter where it had no jurisdiction to act in the first place cannot determine the law of the case, when such decision is not appealed from. But the converse is equally true, that a court decision which was made in a case within that court's jurisdiction, not appealed from and unreversed, establishes the law of the case. It will doubtless suffice on this point to point out to this Court the following language in its earlier decision in *Grubb v. Public Utilities Commission,* 281 U. S. 470, 479, 74 L. ed. 979:

> "The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein v. New Orleans,* 177 U. S. 390, 398, et seq., 44 L. ed. 817, 820, 20 Sup. Ct. Rep. 682; *United States v. California & O. Land Co.,* 192 U. S. 355, 358, 48 L. ed. 476, 478, 24 Sup. Ct. Rep. 266.
>
> "As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S.S. Co. v. Phillips,* 274, U. S. 316, 319, 71 L. ed. 1069, 1071, 47 Sup. Ct. Rep. 600; *United States v. Moser,* 266 U. S. 236, 241, 69 L. ed.

262, 264, 45 Sup. Ct. Rep. 66; *Cromwell v. Sac. County*, 94 U. S. 351, 352, 24 L. ed. 195, 197.

"We think it follows from what has been said that the objections taken to the decree below are so unsubstantial that the motion to affirm without awaiting oral argument should be sustained."

F. Additional Considerations Advanced in Appellants' Brief

In addition to the foregoing reasons which were given by the Commission to support its conclusion, the brief for the appellants cited what might be termed two *other considerations*, viz.:

(a) That if the rates were increased the Post Office Department might discontinue using the service (Appellants' brief, page 57).

(b) That if the decision of the Commission was controlled "by the mathematical results obtained in a statistical cost study made according to an agreement between the Post Office Department and the Carrier as to methods and formulas to be applied in connection with it," • • • "the Commission would be deprived of all *real authority* in the performance of its function • • • It would become nothing more than a checker or annotator of the statistics submitted to it" (Appellants' brief, page 37). (Italics supplied.)

(a) *Possible Discontinuance of Service:* At page 37 of appellants' brief the suggestion is thrown out that if the mail pay rates are increased the Department may discontinue the service, but it is sufficient to say on this aspect that Witness Fulgham, after his inspection of the situation, pressed by counsel for the Department at the second hearing to say something to that effect, testified that he had recommended that the service be continued (R. 100, 101).

There is nothing in the record to indicate that where higher rates have been prescribed (see table on page

COMPARISONS WITH RESPECT TO THE WEIGHT GIVEN TO COST STUDIES

On the Same Cost Study Formula This is What Has been Awarded Other Larger and Other Smaller Roads But Has Been Denied the Georgia & Florida Railroad.

Col. 1	Col. 2 Ratio of Mail Space to Total Passenger Space in Trains	Col. 3 Proportion of Unused Space in Combination Cars Charged to Mail	Col. 4 Indicated Per Cent of Increase Needed	Col. 5 Per Cent of Increase Awarded	Col. 6 The Rates Which Resulted (Cents per Mile)
(1) GEORGIA & FLORIDA RAILROAD (Decided May 10, 1933—192 I.C.C. 779)	12.96%	34.76%	87.40%	NONE	14.50
(2) GENERAL CASE (Decided July 10, 1928—144 I.C.C. 675)					
Class I and Class II Roads:					
Trunk Line Systems	8.27%	27.07%	26.61%	15%	14.50
Lines over 100 Miles					14.50
New England Lines	5.83%	(not shown)	33.58%	15%	19.50
Class II and Class III Roads:					
Lines under 100—over 50 Miles	7.76%	(not shown)	91.00%	80%	14.50
Lines under 50 Miles					34.00
(3) INTERMOUNTAIN AND PACIFIC COAST LINES (Decided Jan. 22, 1925—95 I.C.C. 493; Jan. 5, 1927—120 I.C.C. 439, and Feb. 9, 1929—151 I.C.C. 734)					
Class II and Class III Roads:					
Lines over 100 Miles (95 I.C.C. 493)	9.65%	28.31%	(not shown)	100%	25.00
Lines under 100—over 50 Miles					30.00
Lines under 50 Miles					37.50
Class I Road: Denver & Salt Lake Railroad (232 Miles)—151 I.C.C. 374)	14.70%	43.99%	68.00%	60%	20.00
(4) ELECTRIC LINES—GENERAL (Decided June 2, 1925—58 I.C.C. 455)	(not shown)	(not shown)	(not shown)	(not shown)	30.00
(5) ALABAMA, TENNESSEE & NORTHERN —(186 MILES) (CLASS II ROAD) (Decided April 24, 1926—112 I.C.C. 151)	16.13%	31.29%	134.30%	100%	25.00
(6) WINSTON-SALEM SOUTHBOUND—(90 MILES)—(SUBSIDIARY OF ATLANTIC COAST LINE AND NORFOLK & WESTERN) (CLASS II ROAD) (Decided March 2, 1927—123 I.C.C. 33)	13.17%	68.27%	146.70%	50%	18.75

93) the Post Office Department has discontinued the service. The Department's first interest is to give proper service to the public, and there is nothing in their attitude which indicates that they resent or would vindictively retaliate against the carrier's efforts to obtain adequate compensation.

Be that as it may, the appellees respectfully submit that consideration obviously is not one which warrants discounting any of the evidence.

There is a comparison attempted between the cost of railway and highway transportation in footnote on page 57 of appellants' brief but that is entirely irrelevant because the service furnished by the railroad was that of a travelling postoffice, with clerk, and no service corresponding to it is supplied by a "star route", and total unlikes are not comparable.

(b) *Effect on the Commission's "Real Authority":* The appellees respectfully submit that they are entitled to a decision on the evidence, and not upon any fancied apprehensions as to the extent, if any, to which the Commission's "real authority" might be affected if required to follow the evidence (appellants' brief, page 37).

Appellees only ask that the Georgia & Florida be paid sufficient compensation to cover the cost of carrying the mail, plus a fair return upon the property used in such transportation, as computed from the cost study upon methods which have been upheld by the Commission in all of its previous mail pay decisions, which come the closest that is possible to an accurate cost determination. The Post Office Department accepts those rules as the best basis that the Commission has

been able to devise for their own purposes, and the witness for the Department said that he had never been able to devise any better basis, and that the Post Office Department has never made any attack upon the fairness of that basis (R. 95; Appellants' brief, page 31).

What the carrier does object to is after faithfully following all of the methods and accounting rules laid down by the Interstate Commerce Commission (Appellants' brief, page 31), and after adjusting 100 per cent for every conceivable error, when the result shows that the carrier is entitled to an increase of 87.40 per cent, to then have the Commission give same no weight and say, in effect, that the rules are not exact, so they need not give any credence to the result. This is a denial of due process (*Chicago Junction Railways case*,

The Commission admitted, as it must, in its first decision that many of these other roads with which the Georgia & Florida was classed "are very much larger and have greater traffic and lower unit operating costs" (R. 10). That fact was very graphically shown in Exhibit 748 (R. 254) by the following table of the mileage and earnings for 1931 of the Georgia & Florida as compared with some of those great systems:

	YEAR 1931		
	Average Miles of Road	Railway Operating Revenue	
Name of Railroad	Operated	Total	Per Mile
Georgia & Florida	463.61	$1,357,711	$2,928.56
Baltimore & Ohio	5,645.06	158,474,628	28,073.15
Boston & Maine	2,089.71	57,784,978	27,652.15
Chesapeake & Ohio	3,115.20	119,552,170	38,336.43
Erie	2,316.03	90,153,602	38,925.90
Lehigh Valley	1,361.72	50,024,627	36,736.35
New York Central	11,388.48	382,190,183	33,559.37
New York, N. H. & H.	2,098.88	100,331,094	47,802.21
Norfolk & Western	2,259.46	79,854,748	35,342.40
Pennsylvania	10,897.88	448,090,279	40,862.22
Reading	1,456.99	70,614,089	48,465.73
Total, Year 1931	42,629.41	$1,557,070,398	$36,525.73 (Av.)

It is self-obvious that the conclusion is necessarily an arbitrary one when the Commission finds that the rates which are just and reasonable for those great systems are also reasonable for the Georgia & Florida.

As a further check on the fact that the Commission's conclusions were contrary to the evidence, attention is invited to the table on ~~the opposite page~~ 93, comparing the conclusions reached in other cases with the conclusion in this instance.

That in other instances the Commission has paid regard to the per cent of increase indicated to be needed (by the same cost formula) is shown by the relation between Column 4—the per cent of increase indicated to be needed to pay the mail's proportion of operating expenses and 5¾ per cent return on property devoted to the mail service, and Column 5—the per cent of increase awarded.

What else could be the reason for denying the same weight to the Post Office Department's cost study on the Georgia & Florida:

(1) It cannot be because the same cost study formula is any less certain than on even smaller roads, which on a showing of 91% (Col. 4) needed they were granted an increase of 80% (Col. 5).

(2) It cannot be because the ratio of mail space to total passenger space of 12.96% (Col. 2) on the Georgia & Florida was excessive since the Alabama, Tennessee & Northern ratio was 16.13% (Col. 2) and it was given an increase of 100% (Col. 5).

(3) It cannot be because this carrier's ratio of mail space of 12.96% (Col. 2) was sub-normal since the Intermountain and Pacific Coast Lines with a ratio of 9.65% (Col. 2) were also given an increase of 100%.

(4) It cannot be because the mail's proportion of unused space in combination cars on this carrier of 34.76% (Col. 3) is excessive in view of the fact that the Denver & Salt Lake Railroad had a corresponding proportion of 43.99% (Col. 3) and was awarded an increase of 50% (Col. 6), and the Winston-Salem Southbound, with a similar proportion of 68.27% (Col. 3), was given an increase of 50%.

(5) It cannot be because the mail's proportion of unused space on this carrier of 34.76% (Col. 3) was sub-normal in view of the fact that the Alabama, Tennessee & Northern with a proportion of 31.29% (Col. 3) was awarded an increase of 100% (Col. 6).

CONCLUSION

In conclusion the appellees respectfully refer to the suggestion on pages 13 and 15 of the appellants' brief, that in the absence of any specific finding by the courts as to at least the minimum compensation which would be justified on the evidence the Commission will apparently feel itself at liberty to shunt the proceedings back and forth indefinitely:

If the Commission's position on that proposition has any justification it would extend as much to this Court

as to the lower court, and certainly the appellees are most anxious to receive the much needed benefit of the increases to which they believe they are entitled.

The appellees respectfully submit that on the undisputed evidence, after making all the adjustments claimed by the Post Office Department they are entitled to an increase of 87.40 per cent in their mail pay rates in order to derive the compensation which it is the duty of the United States to pay; and

THEREFORE the appellees respectfully pray that if this Court is convinced of the merit of their cause, that the Court will either (1) affirm the judgment of the court below and include in its opinion and decree a finding as to the minimum increase to which the appellees are entitled on the evidence, or (2) remand the cause to the lower court with directions to make such a decree.

Respectfully submitted,

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